

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

HAROLD GARCIA, *Applicant*

vs.

J M EAGLE; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ11426237
Lodi District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks removal in response to the December 5, 2025 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a mechanic on May 15, 2018, sustained industrial injury to his neck, chest wall, lumbar spine, right shoulder, and psyche. The WCJ found in relevant part that applicant is entitled to a replacement Qualified Medical Evaluator (QME) in neurology, and that the issue of whether a reevaluation is necessary is deferred for reasons of due process.

Defendant contends that the F&O will result in significant prejudice as the WCJ considered geography the determinative factor without giving equal consideration to other factors when addressing whether applicant was entitled to a replacement panel; that the same QME should be used for repeat evaluations to the extent possible; and that the issue of whether a repeat QME evaluation is necessary should be considered contemporaneously with the issue of whether to issue a replacement panel of QMEs.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant defendant's Petition

as one seeking reconsideration, and, applying the removal standard, affirm the F&O except that we will amend the decision to reflect that the evidentiary record does not warrant replacement of the QME.

FACTS

Applicant sustained injury to his neck, chest wall, lumbar spine, right shoulder, and psyche, while employed as a maintenance mechanic by defendant J M Eagle on May 15, 2018.

On October 8, 2025, the parties proceeded to trial and stipulated that applicant currently resides in French Camp, California, and that applicant's current QME in neurology, Michael Butler, M.D., is now only performing evaluations in Indio, California. (Minutes of Hearing, dated October 8, 2025, at p. 2:15.) The parties stipulated to the approximate travel times for both air and land travel between applicant's residence and the QME's offices in Indio. The parties placed in issue whether applicant is entitled to a replacement QME if the defendant agrees to provide appropriate transportation including air travel. (*Id.* at p. 3:16.) Defendant further raised the issue of whether a reevaluation is necessary based on the parties' receipt of interim medical-legal opinions discussing whether applicant's industrial injury included direct trauma to the head and/or brain. (*Id.* at p. 3:21.)

On December 5, 2025, the WCJ issued her F&O, determining in relevant part that "applicant is entitled to a replacement panel in neurology regardless of the defendant providing transportation." (Finding of Fact No. 6.) The WCJ reasoned that when the QME's offices were located in the greater Sacramento region, an evaluation with the QME including travel time would reasonably require a full day. In contrast, the time required to complete the necessary travel and evaluation at the QME's current location in Indio, California, would likely require at least two, but more likely, three days in total. (Opinion on Decision, at p. 3.) The WCJ thus found a replacement panel to be reasonable "given the significant change in geographic location." (*Ibid.*) The WCJ further declined to address the issue of the underlying necessity of a reevaluation with Dr. Butler because the medical reports relied upon by defendant to oppose a reevaluation were not available at the time the matter was originally submitted for decision. (*Id.* at p. 4.)

Defendant's Petition contends that the geographic distance is but one of multiple relevant considerations that should be weighed in determining whether to replace the QME. Defendant contends there is no medical or testimonial evidence that establishes applicant could not travel to

Indio, California, for a reevaluation, and that the potential for prolonging the litigation in this matter by restarting the neurology QME evaluation process should be considered. (Petition, at p. 5:4.) Defendant asserts that pursuant to Administrative Director (AD) Rule 34, subd. (b), the question of whether applicant may be reevaluated at a different office than the original QME evaluation calls into question whether the new office is within a “reasonable geographic distance” from the original office. (Cal. Code Regs., tit. 8, § 34(b).) Defendant contends that pursuant to Labor Code¹ section 4062.3, subd. (k), the parties must utilize the same evaluator for subsequent evaluations “to the extent possible.” (Lab. Code, § 4602.3(k).) Thus, the question of reasonable geographic distance should be considered in light of the statutory mandate to utilize the same QME for reevaluations to the extent possible. (*Id.* at p. 7:10.) Finally, defendant contends “the issue of whether a PQME reevaluation in neurology is necessary is antecedent to the issue of whether applicant is entitled to a replacement panel and both issues should have been considered contemporaneously.” (*Id.* at p. 8:3.)

The WCJ’s Report responds:

[A]pplicant’s credible testimony is that he needs to take break from driving after one hour and that he can only walk about 200 yards. Considering the rigors of travel and the significant amount of preparation the applicant would be expected to do to travel by air, which is also added expense to the applicant, it is appropriate to order a new panel. After taking into consideration the time and distance the applicant is expected to travel and that travel each direction will take a significant toll on the injured worker, a replacement panel was Ordered.

(Report, at p. 2.)

DISCUSSION

I.

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

¹ All further references are to the Labor Code unless otherwise noted.

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] (*Gaona*)). Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the Workers' Compensation Appeals Board (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 a finding regarding threshold issues including injury and employment. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

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 January 5, 2026, and 60 days from the date of transmission is March 6, 2026. This decision is issued by or on March 6, 2026, 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.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on January 5, 2026, and the case was transmitted to the Appeals Board on January 5, 2026. 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 January 5, 2026.

II.

Although the decision contains a finding that is final, the petitioner is only challenging interlocutory findings in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*, 5 Cal.App.5th 658.) 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, defendant challenges the WCJ's determination that applicant is entitled to a replacement QME in neurology and corresponding interlocutory order for the issuance of a replacement panel of QMEs. (Finding of Fact No. 6; Order No. 1.)

The WCJ's opinion focuses on the material change in the requirements for applicant's attendance at the QME's new evaluation location in Indio, California, and the attendant burdens potentially incurred by applicant in traveling there. The WCJ observes that while applicant's initial evaluation with the neurology QME in Sacramento might reasonably contemplate a full day of travel, the trip to Indio, California would likely entail a day of travel in each direction in addition to the day of the evaluation, amounting to a potential 3-day evaluation process. (Report, at p. 2.) The WCJ observes that per applicant's credible testimony, he needs breaks between sitting and standing, and that his tolerances are generally limited to one hour for driving and 200 yards for walking. (*Ibid.*) Based on the demands of a potential three-day travel and evaluation process at the QME's new offices in Indio and the applicant's tolerances for travel, the WCJ concludes that a replacement panel QME is reasonable under the circumstances.

Defendant's Petition contends that a multifactorial analysis is required, and that once a QME evaluation is obtained, the existing QME should be retained to the extent reasonably possible. (Petition, at p. 6:27.) Defendant suggests applicant's tolerances for travel as confirmed in trial testimony are sufficient to enable applicant's travel to the QME's offices in Indio, California. (*Id.* at p. 5:4.) Defendant also asserts there is no medical evidence in the record that would otherwise contraindicate the travel necessary to reevaluation with the QME at his new office location. (*Id.* at p. 5:9.) Defendant further asserts the potential delay in finalizing applicant's claim that would result from restarting the QME process should be weighed as part of the WCJ's analysis. (*Id.* at p. 5:12.)

We begin our analysis by observing that section 4062.3, subd. (k) provides that, "If, after a medical evaluation is prepared, the employer or the employee subsequently objects to any new medical issue, the parties, to the extent possible, shall utilize the same medical evaluator who prepared the previous evaluation to resolve the medical dispute." (Lab. Code, § 4062.3(k).)

Pursuant to AD Rule 34(b) (Cal. Code Regs., tit. 8, § 34(b)), once a QME has been selected, the initial evaluation "shall be conducted at a medical office listed on the panel selection form," unless the parties agree in writing to another office. Thereafter, "[a]ny subsequent evaluation appointments may be performed at another medical office of the selected QME if it is listed with the Medical Director and is within a reasonable geographic distance from the injured worker's residence." (*Ibid.*)

In *Esquivel v. Workers' Comp. Appeals Bd.* (2009) 178 Cal.App.4th 330 (74 Cal.Comp.Cases 1213), the Court of Appeal addressed what would constitute a “reasonable geographic distance” in the context of an employer’s liability for an alleged compensable consequence injury sustained by applicant while en route to a medical treatment appointment. Therein, applicant traveled 130 miles from her home to visit her mother and was involved in a motor vehicle collision shortly after leaving her mother’s home to travel 136 miles to her physician’s office. Applicant alleged her injuries sustained in the motor vehicle collision were a compensable consequence of her industrial injuries. Defendant responded that applicant’s personal travel arrangements took her out of a “reasonable geographic distance” in which defendant would otherwise be liable for injuries incurred while applicant sought medical treatment to cure or relieve from the effects of industrial injury. The Appeals Board agreed and held that applicant’s injuries did not occur within a reasonable geographic distance of her treating physician such that the injuries would be deemed a compensable consequence. The Court of Appeal affirmed, observing that there is no precise definition of what constitutes “reasonable geographic distance” in either statute or regulation. The Court declined to adopt a specific test because “such determinations must be made on a case-by-case basis considering all relevant circumstances.” (*Id.* at p. at p. 1225.) The court then offered a nonexclusive list of relevant considerations, including the locations of the applicant and the evaluating physician, and the reasons for applicant’s travel to the location of the medical evaluation. (*Id.* at p. 1225.)

Our subsequent jurisprudence has similarly employed a multifactorial analysis. In *Martinez v. Consolidated Partitions* (September 23, 2019, ADJ8229086, ADJ8229099) [2019 Cal. Wrk. Comp. P.D. LEXIS 415], the QME evaluated applicant on multiple occasions at the QME’s Oakland offices. Following the QME’s relocation to Los Angeles, defendant petitioned to replace the QME. The WCJ concluded, however, that defendant was not entitled to a replacement QME based on the weighing of various factors including “the multiple evaluations performed by [the QME] since 2012, sitting for deposition, [the] statutory mandate to utilize the same medical evaluator who previously examined the injured worker, and [the fact that] the travel to Los Angeles was not of applicant’s choosing but due to [the QME] limiting her evaluations to that area.” (*Id.* at pp. 14-15.)

Here, the WCJ has accomplished a thorough review of the relevant distances and corresponding travel times between applicant’s residence and local airports, the QME’s new

offices in Indio, California, the local airport, and reasonable estimates of all associated ground transportation times. (See Findings of Fact No. 5.) We agree with the WCJ's analysis of applicant's physical tolerances for extended travel as germane to the issue of whether a replacement panel is necessary under AD Rule 34(b). However, we also observe that section 4062.3(k) requires the parties to continue to use the same QME for reevaluations "to the extent possible." (Lab. Code, § 4062.3(k).) And in this regard, the evidentiary record does not disclose any medical advice that would contraindicate applicant's travel to the QME's new office location. While applicant's credible testimony establishes that he may need to take a break from extended periods of sitting and standing (Minutes, dated June 2, 2025, at p. 4:1), the evidentiary record does not establish medical limitations or other facts or circumstances that would preclude a reevaluation with the current QME. Moreover, applicant's testimony appears to support his ability, "depending on how far he has to go," to engage in air travel and navigate "getting to the airport and through security." (*Id.* at p. 4:11.) Thus, based on the evidence before us, we cannot conclude that the current record warrants the issuance of a replacement panel of QMEs in neurology. We will grant defendant's Petition and amend the Findings of Fact, accordingly.

We wish to emphasize that our decision in this matter is based on the evidentiary record as it currently stands. Should new facts or circumstances relevant to the question of the need for a replacement QME arise in the future, the parties may revisit the issue with the WCJ upon the filing of an appropriate motion and/or request for hearing.

The WCJ's F&O also defers the issue of whether applicant should be reevaluated by the neurology QME in the first instance. (Finding of Fact No. 7.) The WCJ observes that the evidence advanced by defendant in this respect was adduced only after the issues were originally framed and submitted for decision as of the first date of trial on June 2, 2025, and that "to proceed with the issue raised on the date of the second submission would be to prejudice the applicant since there was no notice to the applicant that the issue was to be heard." (Report, at p. 3.) We agree with the WCJ's analysis and affirm her deferral of the issue, accordingly.

However, while we decline to disturb the WCJ's decision in this respect, we also observe that the parties appear to have an underlying *factual dispute* regarding whether applicant struck his head in the first instance. Given the potential relationship between the outcome of this factual dispute and the need for additional medical-legal reporting, the WCJ may wish to direct development of the record with respect to the issue of whether applicant sustained head trauma as

part of his industrial injuries herein. The parties thereafter may wish to consider requesting a factual determination based on testimonial and documentary evidence as a predicate to further medical and medical-legal evaluation of the sequelae of the otherwise admitted industrial injury.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of December 5, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of December 6, 2025 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

...

6. The evidentiary record does not warrant the replacement of the current Qualified Medical Evaluator in the specialty of neurology.

ORDERS

1. Applicant’s motion for the issuance of a replacement panel of Qualified Medical Evaluators in the field of neurology is denied.
2. The issue of whether a QME reevaluation in neurology is needed after the parties’ receipt of the reports of James Shaw, MD, dated June 4, 2025, and Robert Posten, Ph.D., dated August 19, 2025, is deferred.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2026

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

**HAROLD GARCIA
EASON TAMBORNINI
LAW OFFICES OF LOUIS B. PAPELL**

SAR/abs

I certify that I affixed the official seal of the Workers’ Compensation Appeals Board to this original decision on this date. *abs*