

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

**JESUS GUTIERREZ, *Applicant***

**vs.**

**HAL HAYS CONSTRUCTION, INC.;  
FEDERAL INSURANCE COMPANY, administered by  
GALLAGHER BASSETT SACRAMENTO, *Defendants***

**Adjudication Number: ADJ20106865  
Pomona District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 2, 2026, wherein the WCJ found in pertinent part that applicant sustained an injury on August 16, 2024, arising out of and in the course of his employment as a carpenter for defendant to his neck, right arm, right elbow, back, and right ankle; that defendant did not waive its right to challenge the specialty as to qualified medical evaluator (QME) Panel # 7790463; that the specialty of Chiropractic as to QME Panel # 7790463 is inappropriate under AD Rules 31.1(b) and 31.5(a)(10) (Cal. Code Regs., tit. 8, §§ 31.1(b), 31.5(a)(10)); and that the order to stay chiropractic Panel # 7790463 shall be upheld. The WCJ ordered the Medical Unit to issue a replacement panel in orthopedic surgery.

Applicant contends that defendant waived its right to object to the specialty; and that the specialty of chiropractic is not medically inappropriate.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that we deny applicant's Petition.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed

below, we will deny the Petition as one seeking reconsideration, and we will grant it as one for removal and affirm the F&O except that we amend it to find that applicant was entitled to choose the specialty as to QME; that the specialty of chiropractic as to QME Panel # 7790463 is appropriate; and that the order to stay the chiropractic panel is rescinded.

### 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 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 includes a finding regarding a threshold issue with respect to employment and injury. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. 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 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 are persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy. Therefore, we will deny the Petition as one seeking reconsideration and we will grant it as one for removal.

## II.

Former Labor Code section 5909<sup>1</sup> 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.”

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

Here, according to Events, the case was transmitted to the Appeals Board on March 17, 2026, and 60 days from the date of transmission is May 16, 2026. The next business day that is 60 days from the date of transmission is Monday, May 18, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>2</sup> This decision is issued by or on Monday, May 18, 2026, so that we have timely acted on the petition as required by section 5909(a). This decision is issued by or on May 18, 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 March 17, 2026, and the case was transmitted to the Appeals Board on March 17, 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 March 17, 2026.

### III.

According to the WCJ's Opinion on Decision:

The Applicant, Jesus Gutierrez sustained an injury on August 16, 2024 while working for defendant Hal Hays Construction as a carpenter. According to medical reporting contemporaneous with the date of injury, the Applicant fell approximately 4-5 feet off of a ladder, landing onto his right side. (Defendant's Exhibit B, p. 2.) The Applicant initially treated at a Kaiser Permanente facility on the same day where he primarily complained of a right arm injury. (Defendant's Exhibit D, p. 19.) Of note, he expressed that his wrist was in an extended position as he was trying to catch himself. (*Id.*, at p. 21.) Kaiser personnel initially diagnosed the Applicant with right wrist joint pain and right elbow joint pain only. X-rays of

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<sup>2</sup> WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

the Applicant's right upper extremity revealed a fracture in the Applicant's right elbow, identified to be a right olecranon fracture. (*Id.*, at pp. 24, 34.) The Orthopedist on call recommended a sling/splint and conservative management. (*Id.*, at p. 22.) Medical personnel explicitly instructed the Applicant to immobilize his right arm with the sling. (*Id.*, at p. 29.) Of note, there is no evidence of the Applicant having subjective complaints beyond his right upper extremity during this August 16, 2025 encounter at Kaiser.

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Applicant was evaluated on February 6, 2025 by Dr. Meera Jani, another chiropractor. After conducting her initial examination of the Applicant on February 6, 2025, Dr. Jani diagnosed the Applicant with cephalgia, cervical spine sprain/strain rule out radiculitis/radiculopathy/secondary to herniated cervical disc, lumbar spine sprain/strain rule out radiculitis/radiculopathy/secondary to herniated lumbar disc, thoracic sprain/strain, right shoulder sprain/strain rule out tendonitis/impingement/cuff tear/internal derangement, right elbow sprain/strain rule out medial/lateral epicondylitis/cubital tunnel syndrome, right wrist, sprain/strain rule out internal derangement/TFCC tear, and right hand sprain/strain rule out tendinitis/carpal tunnel syndrome, and right ankle sprain. (Defendant's Exhibit B, at p. 9.)

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On or around February 24, 2025, the Defense counsel objected to Dr. Jani's February 6, 2025 report pursuant to Labor Code section 2062.2(b), citing her intention to secure a QME Panel. (Applicant's Exhibit 1.) Defendant raised the following medical disputes: permanent and stationary status; the Applicant's ability to engage in his usual occupation (seemingly related to disability status and/or permanent work restrictions); the extent and scope of medical treatment; the existence, nature and extent of permanent disability and apportionment; and the causation of injury. (*Ibid.*)

Based upon this objection letter, Applicant counsel requested a QME Panel in the specialty of Chiropractic pursuant to Labor Code section 4062 on March 11, 2025. The Medical Unit then issued QME Panel # 7790463 the following day. (Applicant's Exhibit 2.) According to Defense counsel, she attempted to secure a QME Panel at or around the same timeframe as Applicant's counsel. (Defendant's Exhibit A.) However, it appears that Applicant's counsel was first-in-time to click the submit button as the Medical Unit fulfilled Applicant counsel's Panel request, disallowing Defendant's effort to secure one.

Under Labor Code section 4062.2(c), Defense counsel struck Dr. Niveen Gorgy from QME Panel # 7790463 on March 21, 2025. (Applicant's Exhibit 4.) Of note, there is no indication within this strike letter showing that Defendant reserved any objection to QME Panel # 7790463, particularly any objection as to the specialty of the panel. Applicant's counsel eventually struck Dr. Anish Chandra from the QME Panel on March 27, 2025, which may be considered untimely depending on

whether the holdings in *Messele v. Pitco Foods, Inc.* and California Code of Regulations section 10605 are applicable to the party requesting the Panel through the Medical Unit's online portal. (Applicant's Exhibit 3.)

Then on June 2, 2025, Defense counsel sought an agreement to utilize an Agreed Medical Evaluator in Orthopedic Surgery. (Defendant's Exhibit M.) In furtherance of her efforts to get the parties to agree upon an Orthopedic AME over the Chiropractic QME Panel, Defendant filed a Declaration of Readiness to Proceed.<sup>4</sup> There is no evidence on the record showing that the parties reached an agreement during the June 26, 2025 Status Conference to utilize an Orthopedic AME.

According to Defendant, Applicant's hearing representative during the June 26, 2025 Status Conference lacked the authority to agree upon an Orthopedic AME; instead, he directed Defense counsel to submit a list of proposed Orthopedic AMEs to the handling attorney for consideration. And when no agreement had been reached, Defense counsel filed her Petition to Stay the Chiropractic PQME Panel #7790463 on September 29, 2025, disputing the appropriateness of the Chiropractic specialty and seeking replacement to a panel in Orthopedic Surgery. (Defendant's Exhibit A.) WCJ Bernal ordered that QME Panel # 7790463 be stayed, and deferred all issues to the November 10, 2025 Mandatory Settlement Conference.

In the Opinion, the WCJ stated that:

Here, the Defendant took many affirmative steps to dispute the appropriateness of the Chiropractic Panel. The Court acknowledges that Defense counsel's March 21, 2025 strike letter did not explicitly reserve an objection to the Panel specialty. However, Defense counsel's conduct since then depicts her many efforts to affirmatively challenge the Panel specialty.

In fact, defendant's March 21, 2025 letter states in its entirety as follows:

We are in receipt of Chiropractic Panel QME List No. 7790463 dated March 12, 2025 in connection with the above-referenced matter.

We are hereby exercising Defendant's right to strike Dr. Niveen Gorgy from said Panel list. Should you wish to issue a strike yourself, the same must occur on or before March 22, 2025. Should you not strike timely, we will remove a second doctor from this Panel list and make arrangements for the Applicant to be seen by the remaining doctor. Please be reminded that Defendant does not accept service by way of facsimile, and we will not recognize any untimely strikes.

Should you have any questions regarding the above-outlined matters, please feel free to contact the undersigned at your convenience.

(Exhibit 4, Correspondence by defendant, March 21, 2025.)

Not only does the letter not explicitly refer to objection, it does not contain any objection whatsoever. Applicant is entitled to retain the control of the QME process and did nothing to lose that control. Thus, defendant waived its right to an objection.

To the extent that the WCJ speculates as to the merits of whether chiropractic was the appropriate specialty, if the resultant reporting of the chiropractor is lacking, remedies exist to ensure that the medical record is fully developed and supported by substantial evidence.

Accordingly, applicant's Petition for Reconsideration is denied and is granted as a Petition for Removal, the Findings and Order is affirmed, except that it is amended to find applicant was entitled to choose the specialty as to QME; that the specialty of chiropractic as to QME Panel # 7790463 is appropriate; and that the order to stay the chiropractic panel is rescinded.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**IT IS FURTHER ORDERED** that the Petition for Removal is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on March 2, 2026 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. Applicant was entitled to choose the specialty as to QME.
4. The specialty of Chiropractic as to QME Panel # 7790463 is appropriate under California Code of Regulations sections 31.1(b) and 31.5(a)(10).
5. The Order to Stay Chiropractic Panel # 7790463 is rescinded.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ PAUL F. KELLY, COMMISSIONER**



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

**MAY 18, 2026**

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

**JESUS GUTIERREZ  
LAW OFFICES OF JAMES YANG  
THE LAW OFFICES OF HIRSCHL MULLEN**

**AS/mc**

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