WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KIESHA BIRDSONG, *Applicant*

vs.

TALENTBURST, INC.; SERVICE AMERICAN INDEMNITY COMPANY, administered by CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ18926429
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the January 26, 2026 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant was employed as a customer service representative/billing representative from June 6, 2022, through December 26, 2023 by defendant. The WCJ found, in relevant part, that there was no "ghostwriting" involved in the reporting of Qualified Medical Evaluator (QME) Donald Kim, M.D., but that the medical opinions submitted by the parties were inaccurate, inconsistent and/or incomplete on the issue of causation of applicant's alleged injuries. The WCJ determined that because there was insufficient evidence in the record upon which to base a determination, the evidentiary record required development. The WCJ ordered the parties to submit additional trial records to the QME and to obtain supplemental reporting correcting all clerical errors and addressing the issue of causation.

Defendant contends that the reporting of the QME violates Labor Code[1] section 4628, that such violation precludes returning to the QME for supplemental reporting, and that applicant has not met his burden of establishing injury arising out of and in the course of employment (AOE/COE).

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

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

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claimed injury to her bilateral wrists, bilateral hands, back, knees, arms, and shoulders, while employed as a customer service representative/billing representative by defendant TalentBurst, Inc. from June 6, 2022 to December 26, 2023. Defendant denies injury AOE/COE.

The parties have selected Donald Kim, M.D., as the orthopedic QME. Dr. Kim has issued five reports and has been deposed by the parties. Applicant has also selected Yury Furman, M.D. as her primary treating physician (PTP).

On May 5, 2025, the parties proceeded to trial and framed for decision the issue of injury AOE/COE. (Minutes of Hearing and Summary of Evidence, dated May 5, 2025, at p. 2:14.) The WCJ heard testimony from applicant and continued the trial for further testimony. On July 30, 2025, September 24, 2025, and October 22, 2025, the WCJ heard additional testimony from applicant and witnesses Thomas Romero, Heather Hammond, and Tammy Latu. The WCJ ordered the matter submitted for decision as of November 13, 2025.

On January 26, 2026, the WCJ issued his F&O, determining that the medical reporting submitted by the parties at trial did not constitute substantial medical evidence, and that the medical record required development as a result. (Findings of Fact Nos. 4, 5, & 6.) The WCJ further found that there is no evidence that Dr. Donald Kim has a bias against the defendant (Finding of Fact No. 7); there was no ghostwriting involved in Dr. Kim's reporting (Finding of Fact No. 8); the procedural inadequacies of Dr. Kim's reporting are clerical and not substantive (Finding of Fact No. 9); having Dr. Donald Kim provide additional reporting, taking into consideration the updated history and mechanism of injury, would not frustrate the Legislature's purpose of section 4628 (Finding of Fact No. 10); and that returning to Dr. Donald Kim would not violate the defendant's due process rights (Finding of Fact No. 11). The WCJ ordered the parties to submit relevant trial records including the summaries of applicant and witness testimony to the QME, and to obtain

supplemental reporting "correcting all clerical errors and addressing the issue of causation." (Order No. 1.)

The WCJ's Opinion on Decision explained that the reports of PTP Dr. Furman were signed by persons other than Dr. Furman, and that insofar as the reports lacked confirmation that the signatory to each report was the examining physician, the reports did not comply with Workers' Compensation Appeals Board (WCAB) Rule 10682, subd. (b)(15) (Cal. Code Regs., tit. 8, § 10682(b)(15)) or with section 4628. Accordingly, the WCJ declined to admit the body of PTP reporting into evidence.

With respect to the reporting of QME Dr. Kim, the WCJ noted that the reports disclose a list of individuals involved in the clerical preparation of the report, but that the QME had also testified that he reviewed the summary of records and the underlying reports to ensure accuracy. (Opinion on Decision, at p. 7.) The reports of the QME state that the QME personally interviewed the examinee, performed the physical examination, reviewed the history with the examinee, reviewed the medical records provided, dictated the report, and that the report reflects the QME's professional observations, conclusions, and recommendations. (*Ibid*.) However, the reports did not provide details regarding the roles of the other individuals identified as assisting in clerical preparation of the reporting. Accordingly, with the exception of the deposition transcript of Dr. Kim (Exhibit 15), the WCJ declined to admit the QME reporting in evidence at this time. The WCJ carefully reviewed the summaries of evidence adduced over multiple days of trial and concluded that applicant was a credible witness, and that the rebuttal testimony and evidence provided by the defendant either confirmed the applicant's testimony or did not refute the applicant's testimony. (*Id.* at p. 18.) However, given the lack of substantial medical evidence admitted in the record, the WCJ determined that the evidentiary record required development. The WCJ discussed the issue of whether to return to the QME for supplemental reporting, and observed that "[a] review of Dr. Kim's reporting and his subsequent deposition shows that there was no ghostwriting involved … As such, the procedural inadequacies of Dr. Kim's reporting are clerical and not substantive." (*Id.* at p. 19.) The WCJ concluded that "returning to Dr. Kim to have him provide additional reporting, taking into consideration an updated history and mechanism of injury, would not frustrate the Legislature's purpose in enacting section 4628." (*Ibid*.)

Defendant's Petition contends that section 4628 is a strict liability statute, and that the section "prohibits anyone other than the physician (with limited exceptions) from reviewing and

summarizing prior medical records as part of nonclerical preparation." (Petition, at p. 7:10.) Defendant further contends that to the extent that there is uncertainty in the record as to the participation of the individuals summarizing medical records, the QME reporting violates section 4628 disclosure requirements. Defendant further contends that insofar as the reporting of the QME violates section 4628, returning to the QME is impermissible. (*Id.* at p. 5:23.) Finally, defendant contends that in light of the lack of substantial medical evidence in the record, applicant has not met her burden of establishing injury AOE/COE, and that applicant should "take nothing" as a result of her claim. (*Id.* at p. 8:19.)

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 February 27, 2026, and 60 days from the date of transmission is April 28, 2026. This decision is issued by or on April 28, 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 February 27, 2026, and the case was transmitted to the Appeals Board on February 27, 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 February 27, 2026.

II.

Defendant seeks reconsideration of the WCJ's F&O, wherein the WCJ made several interlocutory determinations (Findings of Fact No. 3 through 11), but also determined in relevant part that applicant was employed by defendant during the period of June 6, 2022 through December 26, 2023 as a customer service representative/billing representative. (Finding of Fact No. 1.)

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 of employment. 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 interlocutory findings/orders 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, defendant contends that section 4628 "treats reviewing and summarizing prior medical records as non-clerical preparation [and] when the record summary function is performed by others, §4628(b) requires disclosure of the name and qualifications of each person who performed those services." (Petition, at p. 4:17.) Defendant asserts that because the QME reporting lists a number of individuals as participating in the preparation of the report, but not disclosing their specific roles, those uncertainties require a finding of a section 4628 violation. (*Id.* at p. 5:4.) Defendant directs our attention to a panel decision[2] in *Sonnier v. Los Angeles Unif. School Dist.*

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

(July 22, 2021, ADJ10793298) [2021 Cal. Wrk. Comp. P.D. LEXIS 197] wherein we held that a QME's reports were inadmissible in proceedings before the WCAB pursuant to section 4628. In *Sonnier*, the reporting physician admitted in deposition that he had not prepared a summary of the submitted medical record, and that the summaries contained in his reporting were prepared by unknown individuals. (*Id.* at p. 14.)

The WCJ's Report responds that the facts in *Sonnier* are distinguishable from the present matter insofar as the QME in *Sonnier* conceded that he had not personally reviewed portions of the underlying medical record. Here, Dr. Kim's reporting attests that he personally interviewed the examinee, performed the physical examination, reviewed the history with the examinee, reviewed the medical records provided, and dictated the report which reflects the physician's professional observations, conclusions and recommendations. The QME further testified that he personally reviewed applicant's narrative history with her (Ex. 15, Transcript of the Deposition of Donald Kim, M.D., dated April 18, 2025, at p. 11:1), and that he personally reviewed the submitted medical record:

> Q Okay. Did you have a chance to actually review the reports? Do you -- did you review the reports or did someone else review the reports and provide you a summary?
>
> A It's actually both. It's actually reviewed and somebody's provided (sic) but then I reviewed the summary and the actual report to make sure it's accurate so it's actually reviewed twice.

(Ex. 15, Transcript of the Deposition of Donald Kim, M.D., dated April 18, 2025, at p. 20:11.)

Thus, following our review of the evidence, we concur with the WCJ's analysis and conclusion that the present evidentiary record does not establish that the physician failed to review the submitted medical record, or that the report was a result of "ghost writing." (Finding of Fact No. 8.) Moreover, we discern no error in the WCJ's determination to develop the record by returning to the QME for supplemental reporting. We note that the determination of whether good cause exists to replace an existing QME is within the sound discretion of a WCJ or the Appeals Board. (*Vazquez v. Inocensio Renteria* (2025) 90 Cal.Comp.Cases 514, 528 (Appeals Board en

banc)[3].) Nonexclusive factors guiding the determination include what efforts, if any, have been made to remedy the QME's availability; case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection; and the Appeals Board's constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (*Id.* at p. 529, citing Cal. Const., art. XIV, § 4.) Here, the WCJ appropriately exercised his judgment in determining that a return to the QME for supplemental reporting was the most appropriate remedy for an inadequate evidentiary record.

We also observe that in those instances where the WCJ determines that one or more medical-legal reports do not meet the relevant minimum standards established by the Administrative Director and the Appeals Board, and the record offers no other competent medical-legal evidence, the WCJ must first consider whether the deficiencies in the report can be cured. (Lab. Code, §§ 5701, 5906; *Tyler v. Worker's Comp. Appeals Bd.* (1997) [56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc); see also *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 937-938 [646 Cal.Comp.Cases 986] ["the Board may act to develop the record with new evidence if ... it concludes that neither side has presented substantial evidence on which a decision could be based"].) Development of the record may include, but is not limited to, supplemental reporting, inquiries of the court, or discovery conducted by the parties designed to address the deficiencies in the reporting. Accordingly, we discern no abuse of the WCJ's discretion in directing the parties to return to the QME to seek clarification of the medical record.

Accordingly, and for the reasons stated above, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy. Applying the removal standard to our inquiry, we deny reconsideration.

Notwithstanding our denial of reconsideration, however, we offer the following nonbinding guidance to the parties with respect to future disputes involving alleged section 4628 violations. We note in the first instance that best practice is to identify the alleged section 4628

[3] En banc decisions of the Worker's Compensation Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

violation with specificity as a trial issue. Pursuant to sections 5313 and 5815 and our en banc decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc), the WCJ is required to "file findings upon all facts involved in the controversy" and to issue a corresponding award, order or decision that states the "reasons or grounds upon which the [court's] determination was made." (Lab. Code, §§ 5313, 5815; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision...." (*Hamilton*, *supra*, at p. 476.) The Court of Appeal has further observed that pursuant to section 5908.5, decisions of the WCAB must state the evidence relied upon and specify in detail the reasons for the decision. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) The purpose of the requirement is "to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans*, *supra*, at p. 755.)

Here, the sole issue raised at trial was injury AOE/COE. (Minutes of Hearing and Summary of Evidence, dated May 5, 2025, at p. 2:14.) Although defendant objected to the admissibility of the reporting of QME Dr. Kim (*Id.* at p. 4:4), best practices would include a specific framing of the issues which the parties assert would preclude admissibility of the reporting, including alleged section 4628 violations. A specific framing of the issue of an alleged section 4628 violation is further required by principles of due process, as the QME whose reporting is alleged to be statutorily deficient is an interested party. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) As we have previously observed:

> In the event a report violates the report preparation and disclosure requirements of section 4628, due process considerations arise and require the WCJ to carefully follow the notice requirements of section 139.2(d)(2) and Appeals Board Rule 10683. (Lab. Code, § 139.2(d)(2); Cal. Code Regs., tit. 8, § 10683.) In both instances, the due process rights of the evaluating physician are implicated, due to the potential consequences of such a finding including the potential loss of QME reappointment under section 139.2(d)(2), and the potential effect on the physician's ability to recover fees for the reporting under section 4628(e).

(*Manalang v. The City Link Foundation* (April 7, 2025, ADJ9595324) [2025 Cal. Wrk. Comp. P.D. LEXIS 108].)

Accordingly, an assertion of a section 4628 violation in trial proceedings should be documented as a specific issue for decision, and the QME provided with notice of the alleged deficiencies and the opportunity to be heard on those deficiencies. (See, e.g., *Searcy (Green) v. Los Angeles Unif. School Dist.* (May 30, 20205, ADJ14483830) [2025 Cal. Wrk. Comp. P.D. LEXIS 206]; *Salazar v. Redlands Unif. School Dist.* (November 7, 2026, ADJ13374764) [2025 Cal. Wrk. Comp. P.D. LEXIS 424].)

Here, however, we discern no good cause to disturb the WCJ's reliance on the attestation and subsequent testimony of the QME that he personally reviewed the submitted medical record, nor do we find good cause to disturb the WCJ's interim directives to the parties to develop the record with the existing QME.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 27, 2026

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

KIESHA BIRDSONG
GOLDEN & TIMBOL
MATIAN LAW GROUP

SAR/abs

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