**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**MIRIAM GONZALEZ CERVANTES,** ***Applicant***

**vs.**

**DAVE & BUSTERS MANAGEMENT CORPORATION;**
**SAFETY NATIONAL CASUALTY CORPORATION,** ***Defendants***

**Adjudication Numbers: ADJ20226877; ADJ20226897**
**Riverside District Office**

# OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on July 29, 2026. The WCJ found, in relevant part, that panel qualified medical evaluator (QME) panel number 7793190, which applicant's attorney obtained in the specialty of Chiropractic Medicine in ADJ20226877 on March 18, 2025, is the appropriate specialty for applicant's orthopedic complaints at issue. The WCJ further found Applicant's Exhibit 1 is not admissible, but Applicant's Exhibit 2 and Defendant's Exhibits B and C are admissible.

Defendant requests, in essence, that the F&O be rescinded as the WCJ erred by not addressing Administrative Director (AD) Rule 31.5(a)(9) (Cal. Code Regs., tit. 8, § 31.5(a)(9)) in her Opinion and by admitting applicant's Exhibit 2.

We have received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have considered the allegations of the Petition 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

dismiss defendant's Petition as one for Reconsideration, treat the Petition as one seeking removal, and deny the Petition.

**DISCUSSION**

**I.**

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code section 5909[1], which states 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.
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> (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 cases were transmitted to the Appeals Board on August 31, 2026, and 60 days from the date of transmission is October 30, 2026. This decision is issued by or on October 30, 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 shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 31, 2026, and the cases were transmitted to the Appeals Board on August 31, 2026. Service

[1] All section references are to the Labor Code, unless otherwise indicated.

of the Report and transmission of the cases 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 August 31, 2026.

**II.**

We find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].)

Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'…"]; *Rymer*, *supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer*, *supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Turning to the Petition, defendant seeks reconsideration of the WCJ's decision regarding the appropriate panel specialty and the admissibility of an exhibit, both which pertain solely to an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision, and we will, therefore, dismiss defendant's Petition as one for Reconsideration and treat the Petition as a Petition for Removal.

**III.**

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, based upon the WCJ's analysis of the merits of petitioner's arguments, 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 if the matter ultimately proceeds to a final decision adverse to petitioner. Thus, we deny the Petition as one for Removal.

**IV.**

Notwithstanding the above, we address the merits of defendant's Petition.

Defendant contends the WCJ failed to address why a panel in Chiropractic Medicine is an appropriate panel specialty pursuant to AD Rule 31.5(a)(9). (Petition, at p. 4.)

As relevant here, AD Rule 31.5(a)(9) states:

> (a) A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs:
>
> > (9) The *Medical Director,* upon written request, finds good cause that a replacement QME or a replacement panel is appropriate for reasons related to the medical nature of the injury. For purposes of this subsection, "good cause" is defined as a documented medical or psychological impairment.

(Cal. Code Regs., tit. 8, § 31.5(a)(9).)

Here, we emphasize that pursuant to AD Rule 31.5(a)(9), upon written request, it is the Medical Director, not the WCJ, who finds good cause that a replacement QME or a replacement panel is appropriate. However, our independent review of the record does not reveal any evidence submitted by defendant regarding any attempts to ask the Medical Director for a replacement panel

in another specialty. Without any evidence, we are perplexed by defendant's argument regarding AD Rule 31.5(a)(9).

Next, we consider defendant's argument that the WCJ erred in admitting Applicant's Exhibit 2, panel number 7793190, dated March 21, 2025. (Petition, at p. 2.) We concur with the WCJ who stated the following in her Report:

> Applicant's Exhibit 2 was properly admitted into evidence. The petition contends that the objections to Applicant's Exhibit 1 and Applicant's Exhibit 2 carry the same weight. Applicant's Exhibit 1 was found inadmissible as a violation of due process under *DPR Construction v. WCAB (McClanahan)* 111 Cal. App. 5th 1136 (2025), because it was not listed as an exhibit on the PTCS.
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> In contrast, the grounds upon which Defendant objected to Applicant's Exhibit 2 was Applicant's violation of California Code of Regulations, Title 8, Section 10620, hereinafter Rule 10620, which pertains to the proper filing of exhibits before trial. Rule 10620 governs Board procedure. Violations of such rules should not run afoul of the constitutional purpose of Workers' Compensation, which is to ensure "substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character." CA. Constitution. Article XIV, Section 4l; *See also Gottlieb v. Kitchen for Exploring Foods,* 2016 Cal. Wrk. Comp. P.D. LEXIS 635: (stating: "[p]rocedural rules. . . , serve the convenience of the WCJ and the parties. They do not deprive the WCJ of the power to dispense with their compliance when justice is served and there is no substantial prejudice to the other party.")
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> The violation of Rule 10620 does not deprive a party of due process. Both parties were in possession of Applicant's Exhibit 2. Unlike Exhibit 1, no party objected to Exhibit 2 on the basis that it was not listed on the PTCS. Thus, it cannot be said that the late filing of Applicant's Exhibit 2 prejudiced Defendant so as to violate Defendant's due process rights by way of undue surprise. Exclusion of Applicant's Exhibit 2, unlike exclusion of Applicant's Exhibit 1, would be based entirely on Applicant's attorney's failure to comply with Rule 10620, which is a rule that exists for the convenience of the Board, as opposed to a rule designed to ensure due process in the proceedings. While parties should not run afoul of such rules, exclusion of evidence is not the appropriate remedy for such violations. Noncompliance would be grounds for sanctions, not exclusion of otherwise admissible evidence. Therefore, Defendant's Exhibit 2 was properly admitted into evidence.
>
> The violation of Rule 10620 does not deprive a party of due process. Both parties were in possession of Applicant's Exhibit 2. Unlike Exhibit 1, no party objected to Exhibit 2 on the basis that it was not listed on the PTCS. Thus, it cannot be said that the late filing of Applicant's Exhibit 2 prejudiced Defendant so as to violate Defendant's due process rights by way of undue surprise. Exclusion of Applicant's Exhibit 2, unlike exclusion of Applicant's Exhibit 1, would be based entirely on Applicant's attorney's failure to comply with Rule 10620, which is a rule that exists

> for the convenience of the Board, as opposed to a rule designed to ensure due process in the proceedings. While parties should not run afoul of such rules, exclusion of evidence is not the appropriate remedy for such violations. Noncompliance would be grounds for sanctions, not exclusion of otherwise admissible evidence. Therefore, Defendant's Exhibit 2 was properly admitted into evidence.

(Report, at pp. 6-7.)

We also add that in *McClanahan*, the Court of Appeal held that under certain circumstances, pursuant to section 5502, evidence existing at the time of the mandatory settlement conference (MSC), but not listed on the pre-trial conference statement (PTCS) may not be admitted. (*DPR Construction v. Workers' Comp. Appeals Bd.* (*McClanahan*) (2025) 111 Cal.App.5th 1136 [90 Cal.Comp.Cases 491].) The case at hand concerning Applicant's Exhibit 2 can easily be distinguished from *McClanahan* as applicant had listed the exhibit on the PTCS at the time of the MSC. Thus, we do not find defendant's argument persuasive.

Finally, we address defendant's argument that since the WCJ did not admit Applicant's Exhibit 1, the record contains no admissible evidence of whether a panel was properly obtained by the applicant, and consequently, the panel must be invalidated. (Petition, at p. 12.)

The WCJ stated the following in her Report:

> The Findings and Order and Opinion on Decision were based on the admitted evidence and were in regards to the submitted issues at trial. Petitioner contends that the undersigned cited to information in Applicant's Exhibit 1 to support a finding that the panel was validly obtained. The parties did not raise the issue of panel validity at time of trial. If panel validity was an issue in the case, as argued by Petitioner, the undersigned is perplexed by why Petitioner did not raise the issue at trial. Nevertheless, this issue was neither presented nor considered by the undersigned.
>
> The issues the parties submitted at trial were very limited. The issues were appropriate panel specialty and admissibility of evidence. The undersigned made no reliance on Applicant's Exhibit 1 in deciding those issues. The undersigned did rely on Applicant's Exhibit 2 as to basic facts regarding the panel, such as the requesting party and date requested/obtained.
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> There is nothing in the Findings and Order or Opinion on Decision that relies on excluded evidence.

(Report, at p. 7.)

We agree with the WCJ and emphasize that an issue that could have been raised at trial, but was not raised, should not be raised for the first time in a petition for reconsideration. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1265 [54 Cal.Comp.Cases 145, 148]; *Davis v. Interim Health Care* (2000) 65 Cal.Comp.Cases 1039, 1044 (Appeals Board en banc).)

Accordingly, to the extent that defendant seeks reconsideration, the Petition is dismissed, and to the extent that defendant seeks removal of the July 29, 2026 F&O, the Petition is denied.

**V.**

We note that petitions for reconsideration of non-final orders are not permissible and may be sanctionable. (See *Ledezma v. Kareem Cart Commissary and Mfg.* (2024) 89 Cal.Comp.Cases 462, 475 (Appeals Bd. en banc). Petitions challenging a decision that consists only of a non-final order should be filed as a petition for removal. An offending party could be subject to potential sanctions under section 5813 and WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421).

Moreover, raising issues in a Petition for Reconsideration that were not raised at trial is grounds for sanctions under section 5813. (See *Brodie v. Carmax*, 2013 Cal. Wrk. Comp. P.D. LEXIS 474; *Rodriguez v. Air Coastal Fleet Services*, 2013 Cal. Wrk. Comp. P.D. LEXIS 624.)

Accordingly, we find it necessary to admonish defense counsel, Jesse A. Bernal with Bernal Law Group, PC, for failing to follow the applicable statutes and the Appeals Board's Rules of Practice and Procedure. Future compliance with the WCAB Rules is expected, and failure to do so will subject the offending party to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

For the foregoing reasons,

**IT IS ORDERED** defendant's Petition for Reconsideration of the Order issued by the WCJ on July 29, 2026 is **DISMISSED** and the Petition for Removal is **DENIED.**

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

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

**October 28, 2026**

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

**MIRIAM GONZALEZ CERVANTES**
**KHAKSHOUR FREEMAN**
**BERNAL LAW**

**JL/abs**

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