

CASE #: B318842, Div: 8

In the
Court of Appeal
of the
State of California
SECOND APPELLATE DISTRICT
DIVISION _____

B _____

MICHELE EARLEY, ASHRAF GORGI, HYUN SOOK LEE,
JOSE FLORES CAMPOS and ROMAN HERNANDEZ AGUILAR,
Applicants and Petitioners,

v.

THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA,
Respondent,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
EMPLOYERS COMPENSATION INSURANCE COMPANY,
ACE PROPERTY & CASUALTY INSURANCE, SAMSUNG FIRE & MARINE INSURANCE,
AMPCO CONTRACTING INC., ACE AMERICAN INSURANCE COMPANY,
STATE COMPENSATION INSURANCE FUND, ICW INSURANCE COMPANY and FV SALVAGE,
Defendants and Real Parties in Interest.

FROM DECISIONS OF THE WORKERS' COMPENSATION APPEALS BOARD
CASE NOS. ADJ4430885, ADJ11016330, ADJ9372475, ADJ10047707, ADJ11934915 & ADJ11733861
**PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF IS MADE
PURSUANT TO CODE OF CIVIL PROCEDURE §§ 1085 and 1086 AND LABOR CODE § 5955**

**PETITION FOR WRIT OF MANDATE
AND/OR OTHER APPROPRIATE RELIEF**

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Court of Appeal
of the
State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: B_____

Case Name: Michele Earley, et al. v. WCAB

There are no interested entities or parties to list in this Certificate per California Rules of Court, rule 8.208

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
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1. SEE ATTACHMENT A

2.

3.

4.

5.

6.

7.

8.

9.

10.

/s/ Charles R. Rondeau

Signature of Attorney/Party Submitting Form

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ATTACHMENT A

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Name of Interested Entity or Person	Nature of Interest
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Steven K. Nahed	Counsel for Ashraf Gorgi in WCAB Matter
Jamey A. Teitell	Counsel for Hyun Sook Lee in WCAB Matter
Michael Burgis	Counsel for Jose Flores Campos & Roman Hernandez Aguilar in WCAB Matter
Insurance Company of the State of Pennsylvania	Defendant in WCAB Matter
Employers Compensation Insurance Company	Defendant in WCAB Matter
ACE Property & Casualty Insurance	Defendant in WCAB Matter
Samsung Fire & Marine Insurance	Defendant in WCAB Matter
AMPCO Contracting Inc.	Defendant in WCAB Matter
ACE American Insurance Company	Defendant in WCAB Matter
State Compensation Insurance Fund	Defendant in WCAB Matter
ICW Insurance Company	Defendant in WCAB Matter
F V Salvage	Defendant in WCAB Matter

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ISSUES PRESENTED

Do the “grant and study” orders issued in Petitioners’ cases, pursuant to which Respondent Workers’ Compensation Appeals Board has granted itself indefinite extensions of time to render final decisions in their cases, violate the constitutional mandate and the declared public policy that such decisions must be made “expeditiously, inexpensively, and without incumbrance of any character”?

Did Respondent Workers’ Compensation Appeals Board act in excess of its powers by issuing the “grant and study” orders in Petitioners’ cases since no statute permits the Board to grant itself extensions of time to decide the merits of petitions for reconsideration beyond the sixty-day time limit provided for in Labor Code sections 5315 and 5909?

Did Respondent Workers’ Compensation Appeals Board fail to discharge its mandatory, ministerial duty pursuant to Labor Code sections 5315 and 5909 to decide the merits of the petitions for reconsideration filed in Petitioners’ cases within sixty days of the filing of such petitions?

Does the use of the discretionary, *ad hoc* “grant and study” order procedure by Respondent Workers’ Compensation Appeals Board constitute an unlawful “underground regulation”?

INTRODUCTION: WHY RELIEF SHOULD BE GRANTED

Article XIV, Section 4, of our state Constitution vests the Legislature with “plenary power ...to create, and enforce a complete system of workers’ compensation, by appropriate legislation”, including the power to create an administrative tribunal to render decisions concerning all disputes arising under such legislation with the mandate that all such disputes be decided “expeditiously, inexpensively, and without incumbrance of any character”. Respondent WORKERS’ COMPENSATION APPEALS BOARD (“WCAB” or “Board”) is the administrative tribunal thus created and charged with carrying out this constitutional mandate.

This Petition is brought by a representative group of California injured workers all of whom have been denied their constitutionally-guaranteed right to speedy and unencumbered resolution of their claims for workers’ compensation benefits as a result of the WCAB’s issuance of so-called “grant and study” orders in response to petitions for reconsideration seeking review of the trial level decisions in

Petitioners' cases. By way of these orders, the Board has granted itself, *sua sponte* and without any statutorily-granted authority, indefinite extensions of time to render final decisions concerning the disputes in Petitioner's cases. To make matters worse, Petitioners are precluded from seeking adjudication of any further disputes which may arise until the WCAB finally issues its final decision regarding the issues placed on indefinite hold by the "grant and study" orders issued in their cases.¹

Sadly, Petitioners' predicament does not represent an isolated, "outlier" phenomenon. Quite to the contrary, Petitioners have determined, through data provided by the Board itself in response to a California Public Records Act information request, that as October 2021 more than five hundred (500) cases remain undecided as a result of "grant and study" orders issued within the preceding three-year period alone.

Petitioners assert that the WCAB's practice of issuing "grant and study" orders is unconstitutional on its face since this practice is antithetical to and utterly irreconcilable with the constitutional

¹ See *Rosendin Electric, Inc. v. Workers' Comp. Appeals Bd.*, 73 Cal. Comp. Case. 1123 (2008)(*writ denied*)(*"Rosendin"*).

mandate that disputes in workers' compensation cases be decided "expeditiously, inexpensively, and without incumbrance of any character". Similarly, Petitioners assert that this practice violates the "compensation bargain" upon which the California workers' compensation system is predicated by denying them speedy delivery of benefits.

Moreover, Petitioners assert that "grant and study" orders are void *per se* because the WCAB lacks any statutory authority to issue such orders and indefinitely extend the sixty-day time limit within which the Board must decide the merits of petitions for reconsideration as provided for in Labor Code sections 5315 and 5909. Moreover, Petitioners assert that by issuing such orders the WCAB failed to discharge its mandatory, ministerial duty to render final decisions regarding the petitions for reconsideration filed in Petitioners' workers' compensation cases within this sixty-day period.

Additionally, Petitioners assert that the only discernible rationale for the Board's use of the "grant and study" procedure is its apparent interpretation that the phrase "acted upon" as set forth in Section 5909 means and includes taking any action at all in response

to the filing of a petition for reconsideration², including (in the case of “grant and study” orders) “deciding without deciding” the issues presented. Since the WCAB has not promulgated a regulation to formally adopt this construction of Section 5909 through the required process as set forth in California Administrative Procedures Act (*Gov’t Code, §§ 11340 et seq.*)(“APA”), Petitioners contend that any such construction by the Board constitutes an impermissible “underground regulation”.³

Clearly, the WCAB is experiencing a serious problem in complying with its obligation to timely render final determinations in Petitioners’ cases and in those of hundreds of other injured workers. Petitioners can only speculate as to the cause of this problem. Petitioners submit that if inadequate resources (whether financial,

² See *Keil v. Workers’ Comp. Appeals Bd.*, 47 Cal. Comp. Cas. 561 (1982)(*writ denied*)(“Keil”).

³ The regulations adopted by the WCAB which are currently in effect include one only regulation which purports to authorize the issuance of a “grant and study” order, namely, Title 8, Cal. Code of Regs. § 10580 (“Regulation 10580”). That regulation applies only to petitions for reconsideration from a decision made by the Administrative Director of the Division of Workers’ Compensation regarding an employer’s medical provider network. As demonstrated by the Facts and Procedural History section of this Petition, *infra*, none of the disputes in Petitioners’ cases involve a petition for reconsideration from such a determination, and it is inapplicable in their cases.

human or material) are the cause for the Board's inability to render timely final decisions regarding petitions for reconsideration, then the Board had various options to address the situation. The WCAB could have been obtained the additional resources required for it to be able to comply with its statutory obligations by seeking the necessary budgetary appropriations. Alternatively, the Board could have approached the Legislature to extend the time limit provided for in Section 5909. Indeed, the WCAB could have pursued both paths simultaneously.

Instead, however, the Board has decided to continue to follow its unwritten "grant and study" procedure, a "fix" which was created *by fiat* of the WCAB many decades ago,⁴ which has been continuously utilized on an *ad hoc*, discretionary basis until the present time and which has never been the subject of an appellate decision with a supporting opinion validating the lawfulness of this procedure. This "fix" represents the most unjustifiable and most pernicious solution available to the WCAB since its practical effect is

⁴ *California Stevedore & Ballast Cp. V. Industrial Acc. Com.*, 21 Cal. Comp. Cas. 219 (1956)(*writ denied*) is the earliest reported case which mentions the "grant and study" procedure.

to deny, often for years at a time, a final determination of disputes between the parties to workers' compensation cases. As such, the "grant and study" procedure is detrimental to the interests of employers and insurance carriers, as well as those of injured workers.

This Petition presents the Court with a much-needed opportunity for the first appellate court to issue a decision, supported by a written opinion, regarding the constitutionality and lawfulness of the Board's "grant and study" procedure. Due to the gravity and acuity of the ongoing harm suffered by Petitioners and all other parties adversely affected by this procedure, Petitioners request that this Court issue a peremptory writ of mandate granting their requested relief or, in the alternative, issue an alternative writ of mandate and upon return thereon issue an Order to Show Cause to the WCAB on an earliest date convenient for this Court for the Board to show cause why the relief requested by Petitioners should not be granted.

Furthermore, the outcome of these proceedings will directly affect the interests of hundreds of injured workers, as well as those of their employers and the insurance carrier from whom their employers have procured workers' compensation insurance coverage. This fact

is indisputably proven by the evidence submitted in support of this Petition as more fully discussed *infra*. For this reason, Petitioners assert that this Court should, in addition to granting the other relief requested by way of this Petition, award reimbursement to Petitioners of all attorneys' fees and costs incurred in commencing and maintaining these proceedings pursuant to Code of Civil Procedure section 1021.5.

PETITION

**TO THE HONORABLE PRESIDING JUSTICE AND TO
THE HONORABLE ASSOCIATE JUSTICES OF THE
CALIFORNIA COURT OF APPEAL FOR THE SECOND
APPELLATE DISTRICT:**

Pursuant to Labor Code section 5955, as well as Code of Civil Procedure sections 1085 and 1086, Petitioners MICHELE EARLEY, ASHRAF GORGI, HYUN SOOK LEE, and ROMAN HERNANDEZ AGUILAR and DANIEL CAMPOS FLORES ("Petitioners") hereby petition this Court for issuance of a writ of mandate and/or other appropriate relief and in support thereof allege as follows:

THE PARTIES

1. Petitioner MICHELLE EARLEY, a resident of the County of San Bernardino, State of California, is an injured worker seeking workers compensation benefits before the WCAB in Case No. ADJ4430885.

2. Petitioner ASHRAF GORGI, a resident of the County of Los Angeles, State of California, is an injured worker seeking workers compensation benefits before the WCAB in Case No. ADJ11016330.

3. Petitioner HYUN SOOK LEE, a resident of the County of Los Angeles, State of California, is an injured worker seeking workers compensation benefits before the WCAB in Case Nos. ADJ9372475 and ADJ10047707.

4. Petitioner ROMAN HERNANDEZ AGUILAR, a resident of the County of Los Angeles, State of California, is an injured worker seeking workers compensation benefits before the WCAB in Case No. ADJ11733861.

5. Petitioner DANIEL CAMPOS FLORES, a resident of the County of Los Angeles, State of California, is an injured worker seeking workers compensation benefits before the WCAB in Case No. ADJ11934915.

6. Respondent WORKERS' COMPENSATION APPEALS Board ("WCAB" or "Board") is responsible for and discharges all judicial functions within the California workers' compensation system, (*Lab. Code, § 111*), including determinations regarding petitions for reconsideration seeking review of trial level decisions made by Workers' Compensation Administrative Law Judges ("WCALJ's").

7. Real Parties In Interest INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, EMPLOYERS COMPENSATION INSURANCE COMPANY, ACE PROPERTY & CASUALTY INSURANCE, SAMSUNG FIRE & MARINE INSURANCE, AMPCO CONTRACTING INC., and FV SALVAGE have interests adverse to those of Petitioners, have formally entered their appearances and participated in the underlying proceedings before the WCAB.

FACTS AND PROCEDURAL HISTORY

Petitioner MICHELE EARLEY

8. During the period from April 13, 1997, through April 13, 1998, Petitioner MICHELLE EARLEY ("EARLEY"), while employed by Cox Communications, then insured for workers' compensation benefits by Real Party in Interest INSURANCE COMPANY OF THE

STATE OF PENNSYLVANIA, sustained work-related injuries to her neck and psyche. (*See Exh 1., pp. 6-12.*)

9. On February 26, 2020, Petitioner EARLEY proceeded to trial before the Honorable Joanne M. Coane, Workers' Compensation Administrative Law Judge ("Judge Coane") regarding Petitioner EARLEY's claims for reimbursement for certain self-procured medical expenses related to her work-related injuries. (*Id.*)

10. On or about May 14, 2020, Judge Coane issued her Findings of Facts and Findings and Award, as well as her supporting Opinion on Decision, in which she found that Petitioner EARLEY was entitled to receive reimbursement for her claimed self-procured medical expenses. (*Id.; Exh. 2, pp. 13-54*)

11. On or about June 8, 2020, Real Party in Interest INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, by and through its counsel of record, filed a Petition for Reconsideration seeking review by the WCAB of Judge Coane's May 14, 2020 Findings of Facts and Findings and Award. (*Ex .3, pp. 55 -71*)

12. On or about June 19, 2020, Judge Coane issued her Report and Recommendation recommending that the Petition for Reconsideration be denied. (*Exh. 4, pp. 72 - 115*)

13. On or about June 29, 2020, the WCAB issued its Opinion and Order Granting Reconsideration “to further study the factual and legal issues presented in this case.” (*Exh. 5, pp. 116 - 119*)

14. As of the date of the filing of this Petition, the WCAB has not issued a final decision with respect to merits of the petition for reconsideration filed in Petitioner EARLEY’s case.

Petitioner ASHRAF GORGI

15. On June 1, 2013, Petitioner ASHRAF GORGI (“GORGI”), while employed by Kolah Farangi Restaurant, then insured for workers’ compensation benefits by Real Party in Interest EMPLOYERS COMPENSATION INSURANCE COMPANY, sustained a work-related injury to his abdomen and is also alleging further injury to his psyche, skin body system (cancer), and headaches arising out of such injury. (*Exh. 6, pp. 120 - 122*)

16. On March 5, 2020, Petitioner GORGI proceeded to trial before the Honorable Tommy A. Ruedaflores, Workers’ Compensation Administrative Law Judge (“Judge Ruedaflores”) regarding: (a) whether Petitioner GORGI had sustained a work-related injury on the date alleged; and (b) if so, which parts of body and bodily systems were injured on that date.

17. On or about May 24, 2021, Judge Ruedaflores issued his Findings of Facts, as well as his supporting Opinion on Decision, in which he found that Petitioner GORGI had sustained a work-related injury to his abdomen on June 1, 2013, but that he had not sustained injuries to any of the remaining alleged body parts and systems. (*Id.*; *Exh. 7, pp. 123 - 125*)

18. On or about June 9, 2021, Petitioner GORGI, by and through his counsel, filed a Petition for Reconsideration seeking review of Judge Ruedaflores' May 24, 2021 Findings of Facts. (*Exh. 8, pp. 126 - 138*)

19. On or about June 29, 2021, Judge Ruedaflores issued his Report and Recommendation recommending that the Petition for Reconsideration be denied. (*Exh. 9, pp. 139 - 148*)

20. On or about August 4, 2021, the WCAB issued its Opinion and Order Granting Reconsideration "to further study the factual and legal issues presented in this case." (*Exh. 10, pp. 149 - 151*)

21. As of the date of the filing of this Petition, the WCAB has not issued a final decision with respect to the merits of the petition for reconsideration filed in Petitioner GORGI's case.

Petitioner HYUN SOOK LEE

22. On April 18, 2012, Petitioner HYUN SOOK LEE (“LEE”), while employed by Makeshopncompany, Inc., then insured for workers’ compensation benefits by Real Party in Interest ACE PROPERTY & CASUATLY COMPANY (“ACE PROPERTY & CASUALTY”), sustained a work-related injury to her cervical spine, lumbar spine, right shoulder, right elbow, right hand, right thumb, psychological system, and urological system. (*Exh. 11, pp. 152 - 156*)

23. During the period December 27, 2011, through March 5, 2013, Petitioner LEE, while employed by Makeshopncompany, Inc., then insured for workers’ compensation benefits by Real Parties in Interest ACE PROPERTY & CASUALTY and SAMSUNG FIRE & MARINE INSURANCE, sustained a work-related injury to her cervical spine, lumbar spine, right shoulder, right elbow, right hand, right thumb, psychological system, and urological system. (*Id.*)

24. On March 5, 2021, Petitioner LEE proceeded to trial before the Honorable Edgar Medina, Workers’ Compensation Administrative Law Judge (“Judge Medina”) regarding numerous issues, principally: (a) whether Petitioner LEE had sustained work-related injuries on April 18, 2012, and during the period December 27,

2011, through March 5, 2013; (b) if so, which parts of body and bodily systems were involved in these injuries; (c) the nature and extent of any permanent disability caused by these injuries; (d) whether any such permanent disability should be apportioned to non-industrial causes or factors; (e) whether any such permanent disability should be separately apportioned as between the two alleged work-related injuries. In addition, Real Party in Interest ACE PROPERTY & CASUALTY objected to the matter proceeding forward to trial alleging that it had not been afforded sufficient opportunity to obtain an evaluation by a state-appointed Panel Qualified Medical Evaluator ("PQME") regarding Petitioner LEE's orthopedic injury claims.

25. On or about June 17, 2021, Judge Medina issued his Joint Findings of Facts and Award, as well as his supporting Opinion on Decision, in which he found that: (a) Petitioner LEE had sustained work-related injuries on April 18, 2012, and during the period December 27, 2011, through March 5, 2013, to her cervical spine, lumbar spine, right shoulder, right elbow, right hand, right thumb, psychological system, and urological system; (b) that as a result of these injuries Petitioner LEE suffered 100% permanent, total disability; (c) that Petitioner LEE's permanent disability could not be

separately apportioned as between the two work-related injuries found; and (d) Real Party in Interest ACE PROPERTY & CASUALTY had been afforded sufficient opportunity to obtain an PQME evaluation regarding Petitioner LEE's orthopedic injury claims and had failed to act with due diligence in obtaining such an evaluation. (*Id*; *Exh. 12*, pp. 157 - 166)

26. On or about July 12, 2021, Real Party in Interest ACE PROPERTY & CASUALTY, by and through its counsel, filed a Petition for Reconsideration seeking review of Judge Medina's June 17, 2021 Joint Findings of Facts and Award.⁵ (*Exh. 13*, pp. 167 - 182)

27. On or about July 17, 2021, Judge Medina issued his Report and Recommendation recommending that the Petition for

⁵ Real Party in Interest ACE PROPERTY & CASUALTY contemporaneously filed a separate Petition for Removal pursuant to Title 8, California Code of Regulations, § 10955, alleging that it had suffered significant prejudice and irreparable harm as a result of Judge Medina's decision to proceed to trial on March 5, 2021, thereby denying Real Party in Interest ACE PROPERTY & CASUALTY the opportunity to obtain a PQME evaluation regarding Petitioner LEE's alleged orthopedic injury claims. Since neither the Labor Code nor the relevant Title 8 regulations provide for a time limit within which Respondent WCAB must act upon such a petition, it is not relevant to the issues raised in this Petition.

Reconsideration filed by Real Party in Interest ACE PROPERTY & CASUALTY be denied. (*Exh. 14, pp. 183 - 192*)

28. On or about September 10, 2021, the WCAB issued its Opinion and Order Granting Reconsideration “to further study the factual and legal issues presented in this case.” (*Exh. 15, pp. 193 - 195*)

29. As of the date of the filing of this Petition, the WCAB has not issued a final decision with respect to the merits of the petition for reconsideration filed in Petitioner LEE’s case.

Petitioners ROMAN HERNANDEZ AGUILAR and JOSE CAMPOS FLORES

30. Petitioners ROMAN HERNANDEZ AGUILAR (“AGUILAR”) and JOSE CAMPOS FLORES (“FLORES”) allege that they sustained work-related injuries on September 28, 2018, while employed by Real Party in Interest AMPCO CONTRACTING, INC. (“AMPCO CONTRACTING”). (*Exh. 16, pp. 196 - 197*)

31. On March 5, 2021, Petitioners AGUILAR and CAMPOS proceeded to trial before the Honorable Lynn Devine, Workers’ Compensation Administrative Law Judge (“Judge Devine”) regarding the sole issue of whether they were employed by Real Party in Interest AMPCO CONTRACTING on the alleged date of injury.

32. On or about July 7, 2021, Judge Devine issued her Joint Finding of Fact, as well as her supporting Opinion on Decision, in which she found that Petitioners AGUILAR and CAMPOS were, in fact, employed by Real Party in Interest AMPCO CONTRACTING on the alleged date of injury. (*Id.*; *Exh. 17, pp. 198 - 202*)

33. On or about July 27, 2021, Real Party in Interest AMPCO CONTRACTING, by and through its counsel, filed a Petition for Reconsideration seeking review of Judge Devine's July 7, 2021 Joint Finding of Fact. (*Exh. 18, pp. 203 - 222*)

34. On or about August 2, 2021, Judge Devine issued her Report and Recommendation recommending that the Petition for Reconsideration filed by Real Party in Interest AMPCO CONTRACTING be denied. (*Exh. 19, pp. 223 - 231*)

35. On or about September 27, 2021, the WCAB issued its Opinion and Order Granting Reconsideration "to further study the factual and legal issues presented in this case." (*Exh. 20, pp. 232 - 234*)

36. As of the date of the filing of this Petition, the WCAB has not issued a final decision with respect to the merits of the petition for reconsideration filed in Petitioner AGUILAR's and Petitioner FLORES' cases.

The CPRA Request

37. On October 16, 2021, Petitioner filed a request via email message with the WCAB pursuant to the California Public Records Act (*Gov't Code, §§ 6250 et seq.*) ("CPRA"), specifically requesting copies of "each 'Opinion and Order Granting Petition for Reconsideration' in every pending case before the Workers Compensation Appeals Board that has been issued between 10/1/18 through 10/1/21 based in whole, or in part, on the Workers Compensation Appeals Boards [sic] determination that the granting of the Petition was necessary to allow sufficient opportunity 'to further study the factual and legal issues' in each of the cases" pursuant to the CPRA. (*Exh. 21, pp. 235- 237*)

38. On October 25, 2021, Anne Schmitz, Secretary and Deputy Commissioner of the WCAB ("Schmitz"), replied via email message to Petitioner EARLEY's CPRA request, stating, in part: "In an effort to provide you with the information you are seeking as quickly and efficiently as possible, I am drawing together a spreadsheet, which will show our current list of cases that have been granted for study. I am also able to produce a current copy of the

template for the grant for study form pleading, which is used when we grant for study.” (Exh. 22, pp. 238 - 240)

39. On November 2, 2021, Deputy Commissioner Schmitz forwarded to Petitioner EARLEY via email message both the promised spreadsheet⁶ and the template used by the WCAB for issuance of “grant and study” orders. (Exhs. 23, 24 & 25, pp. 241 - 283). The spreadsheet reveals that, as of the date of its production to Petitioner EARLEY, the WCAB had issued “grant and study” orders in no less than five hundred forty-three (543) cases between October 1, 2018, and October 1, 2021, which remained undecided by the Board.

SUBJECT MATTER JURISDICTION

40. This Court has jurisdiction to grant the requested writ of mandate and/or other relief pursuant to Labor Code section 5955, as well as Code of Civil Procedure sections 1085 and 1086.

41. Furthermore, as more fully discussed *infra*, this Court has jurisdiction to grant the relief requested by way of this Petition

⁶ The spreadsheet was produced by the Board in PDF format. This document has been converted into XLSX (Microsoft Excel) format and then re-converted into PDF format for ease of reading and analysis. Copies of both versions of the spreadsheet are being filed as exhibits in support of this Petition.

pursuant to *Loustalot v. Superior Court*, 30 Cal. 2d 905 (1947)(“*Loustalot*”); *Fidelity & Cas. Co. v. Workers’ Comp. Appeals Bd.*, 103 Cal. App. 3d 1001 (1980)(“*Fidelity & Cas. Co.*”); *Greener v. Workers’ Comp. Appeals Bd.*, 6 Cal. 4th 1028 (1993)(“*Greener*”); *Betancourt v. Workers’ Comp. Appeals Bd.*, 16 Cal. App. 3d 408 (1993)(“*Betancourt*”); *Rea v. Workers’ Comp. Appeals Bd.*, 127 Cal. App. 4th 625 (2005)(“*Rea*”); and *Clovis Unified School Dist. v. Chiang*, 188 Cal. App. 4th 794 (2010)(“*Chiang*”), and in that by way of this Petition: (a) Petitioners assert that Respondent WCAB’s “grant and study” procedure is unconstitutional and violative of Article XIV, Section 4, of the California Constitution; (b) Petitioners assert that by issuing the “grant and study” orders in Petitioners’ underlying workers’ compensation cases, the Board acted in excess of the powers and authority expressly granted to it by the Legislature; (c) Petitioners assert that by issuing the “grant and study” orders in Petitioners’ underlying workers’ compensation cases and in all other similar cases the WCAB failed to discharge its mandatory, ministerial duty to render final determinations regarding the petitions for reconsideration filed in Petitioners’ workers’ compensation cases within sixty days of the filing of such petitions; and (d) Petitioners

assert that Respondent WCAB's adoption of and continued adherence to its "grant and study" procedure constitutes an unlawful "underground regulation", the validity of which Petitioners are precluded from challenging in any manner other than this Petition.

VENUE

42. As more fully discussed *infra*, this Court is a proper venue for these proceedings pursuant to Code of Civil Procedure section 393, subdivision (b), as interpreted and applied in *Regents of Univ. of Cal. v. Superior Court (Karst)*, 3 Cal. 3d 529 (1970) ("Karst"), in that: (a) the WCAB is a "public officer" for purposes of applying Section 393; (b) the claims asserted in these proceedings relate to actions taken by such a "public officer"; (c) most of the claims asserted in these proceedings arose within this Court's territorial boundaries since most of Petitioners reside within the County of Los Angeles and the effect of the challenged actions by the Board were "felt" by these Petitioners within such County; and (d) the statutes governing the venue of actions against "public officers" should be liberally construed so as to afford the petitioning party the most convenient forum.

STANDING TO SEEK THE REQUESTED RELIEF

43. The WCAB has previously issued “grant and study” orders in each of Petitioners’ underlying workers’ compensation cases and has not, as of the date of the filing of this Petition, issued final decisions regarding the merits of the petitions for reconsideration filed in those cases.

44. Until such final decisions are issued, Petitioners will be denied the right to receive the workers’ compensation benefits to which they would otherwise be entitled.

45. As such, Petitioners have a clear beneficial interest in these proceedings.

46. Petitioners further assert that they have “public interest” standing to seek relief on behalf of all other parties aggrieved by “grant and study” orders which have not been rendered moot since the issues presented in this Petition involve a public right guaranteed by our state Constitution and codified in the California Labor Code and the relief sought by this Petition is to enforce a public duty thus imposed upon the WCAB. (*Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155 166 (2011).)

LACK OF ADEQUATE REMEDY AT LAW

47. As more fully discussed *infra*, issuance of the requested writ of mandate is required because Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law.

48. Pursuant to Labor Code section 5955, the requested writ of mandate is the only available means by which Petitioners may obtain a determination regarding the lawfulness of Respondent WCAB's "grant and study" procedure and its orders issued pursuant to that procedure.

IRREPARABLE HARM

49. Petitioners will suffer irreparable harm if the relief requested by way of this Petition is not granted since they have no other means of obtaining relief from the "grant and study" orders issued by the Board in their underlying workers' compensation cases and such orders indefinitely delay a final determination of the disputes in their cases.

50. Unless this Court grants the requested relief, Petitioners will be indefinitely denied the right to receive the workers' compensation benefits to which they would otherwise be entitled, and Petitioners will be prevented from seeking adjudication of any

further disputes which may raise, or may already have arisen, in their cases, thereby causing Petitioners to suffer harm and injury which is not presently determinable and which will not be remediable by the granting of relief in any other manner at a later time.

TIMELINESS OF THE PETITION

51. As more fully discussed *infra*, this Petition is timely since, notwithstanding the periods of time which have elapsed between the WCAB's issuance of the "grant and study" orders at issue and the filing of this Petition, Real Parties in Interest have suffered no harm whatsoever during these intervening time periods, thus obviating any claim of laches which would preclude this Court from entertaining this Petition. (*Sturm v. Superior Court*, 164 Cal.App.3d 579, 581 (1985)(*"Sturm"*)[*"As a general rule, in the absence of a specific statutory provision an appellate court may consider a petition for extraordinary writ at any time subject to its discretionary power to deny relief on the grounds of laches."*][citing *Popelka, Allard, McCowan & Jones v. Superior Court*, 107 Cal.App.3d 496, 499 (1980); 5 *Witkin, Cal. Procedure* (2d ed. 1971) Extraordinary Writs, § 118, pp. 3895-3896].)

52. Alternatively, Petitioners assert that this Petition is timely pursuant to *Allen v. Humboldt County Board of Supervisors*, 220

Cal. App. 2d 877 (1963)(“Allen”), and *Kao v. Dept. of Corrections & Rehabilitation*, 244 Cal. App. 4th 1326, 1331 - 1333 (2016)(“Kao”), since: (a) no Labor Code section or any other statute provides for a specific statute of limitations with respect to petitions for writ of mandate against the WCAB or the bringing of the specific claims asserted by way of this Petition; and (b) therefore this Petition and the claims asserted herein are subject to either the three (3) year statute of limitations provided for in Code of Civil Procedure section 338, subdivision (a), or the four (4) year statute of limitations provided for in Code of Civil Procedure section 343.

**APPROPRIATENESS OF ISSUANCE OF
PEREMPTORY WRIT IN THE FIRST INSTANCE**

53. As more fully discussed *infra*, Petitioners assert that this Court should issue a peremptory writ in the first instance pursuant to Code of Civil Procedure section 1088 granting their requested relief on the grounds that: (a) Petitioners are clearly entitled to immediate relief from the “grant and study” orders issued by the Board in their underlying workers’ compensation cases since all such orders are indisputably unconstitutional, unlawful and indefensible for the reasons stated in this Petition; and (b) there is undeniable “temporal urgency” to Petitioners’ requests for relief since until such relief is

granted they will be denied the right to receive the workers' compensation benefits to which they would otherwise be entitled and will be unable to seek adjudication of any further disputes which may raise, or may already have arisen, in their cases, thereby causing Petitioners to suffer harm and injury which will not be remediable by the granting of relief in any other manner at a later time.

**APPROPRIATENESS OF REIMBURSEMENT OF
PETITIONERS' ATTORNEYS' FEES**

54. The outcome of these proceedings will directly affect the interests of hundreds of injured workers, as well as those of their employers and the insurance carriers from whom their employers have procured workers' compensation insurance coverage. This fact is indisputably proven by the spreadsheet produced by the WCAB in response to Petitioner EARLEY's CPRA request.

55. Accordingly, if this Court were to grant the relief requested by way of this Petition reimbursement of all attorneys' fees incurred by Petitioners in commencing and maintaining these proceedings would be appropriate pursuant to Code of Civil Procedure section 1021.5 in that the granting of requested relief: (a) would result in the enforcement of an important right affecting the

public interest; and (b) would confer a substantial benefit upon the general public and/or a large class of persons.

AUTHENTICITY AND ARRANGEMENT OF EXHIBITS

56. The exhibits accompanying this Petition are either: (a) true and correct copies of original documents on file with the WCAB in Petitioners' underlying workers' compensation cases; or (b) true and correct copies of documents produced by the Board in response to the CPRA request by Petitioner EARLEY.

57. The exhibits are paginated consecutively, and the page references in this Petition are to the consecutive pagination.

58. The exhibits are separately arranged in chronological order as to each of Petitioners' underlying workers' compensation cases, rather than in "strict" chronological order, to ensure the most expedient and convenient cross-referencing of the facts alleged in this Petition with the supporting exhibits.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court:

1. Issue a peremptory writ of mandate in the first instance:

(a) Declaring the WCAB's "grant and study" procedure

unconstitutional and unlawful;

(b) Directing the Board to vacate all "grant and study"

orders which have not been rendered moot by a subsequent

final decision on the merits by the WCAB or by a subsequent

voluntary settlement by the parties to those cases;

(c) Directing the WCAB to provide this Court with a

timetable for the rendering of final decisions on the merits in

all such cases; and

(d) Awarding reimbursement to Petitioners for all

attorneys' fees incurred in commencing and maintaining these

proceedings; and

(e) Granting such other and further relief to which

Petitioners may be justly entitled; or

2. Or, in the alternative, issue an alternative writ of mandate and upon return thereon issue an Order to Show Cause directing the WCAB on the earliest date convenient for this Court to

show cause why the relief requested by Petitioners should not be granted.

Dated: MARCH 4, 2022

Respectfully submitted,

/s/ CHARLES R. RONDEAU
Charles R. Rondeau

/s/ THOMAS F. MARTIN
Thomas F. Martin

Attorneys for Petitioners MICHELE
EARLEY, ASHRAF GORGI, HYUN
SOOK LEE, ROMAN HERNANDEZ
AGUILAR and DANIEL CAMPOS
FLORES

VERIFICATION OF COUNSEL

I am an attorney admitted to practice before all of the Courts of this State and am co-counsel to Petitioners MICHELE EARLEY, ASHRAF GORGI, HYUN SOOK LEE, ROMAN HERNANDEZ AGUILAR and DANIEL CAMPOS FLORES in these proceedings.

I have read and reviewed the foregoing PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF ("Petition") and know its contents. I am informed and believe in good faith that the facts alleged in the Petition are true and correct based upon my own personal review of the exhibits submitted in support of the Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed this 4th day of March, 2022, at El Segundo, California.

Dated: MARCH 4, 2022

/s/ CHARLES R. RONDEAU
Charles R. Rondeau

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL ISSUES

A. Proper Grounds Exist For Issuance of the Requested Writ

While the nature and scope of judicial review of decisions by the WCAB are governed by the applicable provisions of the Labor Code, the general provisions of the Code of Civil Procedure governing the issuance of extraordinary writs apply as well. (*New York Knickerbockers v. Workers' Comp. Appeals Bd.*, 240 Cal. App. 4th 1229, 1235-1236 (2015).)

Code of Civil Procedure section 1085 provides that a writ of mandate may be issued in any case where the petitioner has no "plain, speedy, and adequate remedy, in the ordinary course of law." Since the "grant and study" orders issued by the WCAB in Petitioners' underlying workers' compensation cases do not constitute final decisions regarding merits of the petitions for reconsideration filed in their cases (*Flores v. Workmen's Comp. App. Bd.*, 33 Cal. Comp. Cases 334, 335 (1986)[*writ denied*]), Petitioners are precluded from seeking review of the Board's orders by way of a petition for writ of review pursuant to Labor Code section 5950. (*Maranian v. Workers' Comp. Appeals Bd.*, 81 Cal. App. 4th 1068, 1074 (2001.)) As such, Petitioners

have other means other than by way of the requested writ of mandate to obtain a determination as to the lawfulness of the “grant and study” orders issued by the WCAB in their underlying workers’ compensation cases.

Moreover, Petitioners assert that they will clearly suffer irreparable harm if the requested relief is not granted, further justifying the need for issuance of a writ of mandate. A writ of mandate is properly granted where necessary to protect a substantial right and when it is shown the petitioner will suffer some substantial damage if the writ is denied. (*Parker v. Brown*, 40 Cal. 2d 344, 351 (1953).) As alleged herein, Petitioners have a constitutionally-guaranteed right to expeditious resolution of all disputes regarding their claims for workers’ compensation benefits, and their health and welfare is being jeopardized by the WCAB’s unlawful “grant and study” orders which are indefinitely delaying Petitioners’ receipt of the workers’ compensation benefits to which they would otherwise be entitled to receive at this time.

In *Omaha Indemnity Co. v. Superior Court*, 209 Cal. App. 3d 1266 (1989), this Court discussed the various criteria to be considered when

issuance of an extraordinary writ is requested. (*Id.*, at pp. 1274-1274.)

Here, Petitioners meet at least five (5) of these criteria:

- This Petition presents a novel issue of constitutional law, namely, whether the Board's "grant and study" procedure and the resulting orders in Petitioners' cases is consistent with the dictate in Article XIV, Section 4, of our state Constitution which mandates that all disputes in workers' compensation cases be decided "expeditiously, inexpensively, and without incumbrance of any character".

- The issues presented in this Petition are of widespread interest in that they directly impact not only Petitioners but literally hundreds of other injured workers, as well as their employers and insurance carriers or claims administrators.

- Petitioners assert that the "grant and study" orders issued by the WCAB in their underlying workers' compensation cases are clearly erroneous and substantially prejudice their interests;

- Petitioners have no other adequate means for obtaining a determination regarding the lawfulness of these orders; and

- Absent granting of the relief requested by way of this Petition, Petitioners will suffer harm and prejudice which is not remediable in any other manner at a later time.

Accordingly, proper grounds exist for issuance of the requested writ of mandate.

B. This Court Has Subject Matter Jurisdiction to Hear and Determine Petitioners' Challenges to the Lawfulness of the WCAB's "Grant and Study" Procedure

Code of Civil Procedure section 1085, subdivision (a), provides in relevant part: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, Board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station", while Code of Civil Procedure section 1086, provides, in relevant part: "[a writ of mandate] must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."

Labor Code section 5955 provides:

No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals Board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals Board in the performance of its duties but a writ of mandate shall

lie from the Supreme Court or a court of appeal in all proper cases.

More than seventy years ago in *Loustalot*, our Supreme Court interpreted Section 5955 and defined the boundaries between the subject matter jurisdiction of the appellate courts of this state and that of the trial courts over matters involving the California workers' compensation system. In particular, the *Loustalot* court held: "An examination of the legislative history of section 5955 ... clearly shows that section 5955 means that superior courts have no jurisdiction to review or otherwise interfere with the operation of any order of the Industrial Accident Commission." (*Loustalot, supra*, at p. 910.) The Court further held that: "In restricting any interference with the [Industrial Accident Commission's] decisions or orders to proceedings in the appellate courts, the Legislature has carried out the declared policy of the constitutional provision that the commission be unencumbered by any but proceedings in the appellate courts." (*Id.*, at pp. 912-913.)

More recently in *Greener*, our Supreme Court held that Section 5955 reserves to the Supreme Court and the Court of Appeals subject matter jurisdiction "over actions which seek or might lead to an order that would 'suspend or delay the operation or execution thereof, or to

restrain, enjoin, or interfere with the appeals Board in the performance of its duties” (*Greener, supra*, at p. 1040). The *Greener* court observed that pursuant to Section 5955 a petition for a writ of mandate is proper in any case where the WCAB “has failed to do an act required by law” and a request for relief by way of a petition for writ of review does not provide an “equally adequate remedy”. (*Id.*) Ultimately, the Court held that Section 5955 authorizes the Courts of Appeal to issue a writ of mandate against the Board “in any situation in which mandamus is available under Code of Civil Procedure section 1985.” (*Id.*, at p. 1046.)

In *Fidelity & Cas. Co.*, the Court of Appeal expressly held that a petition for writ of mandate pursuant to Section 5955 is proper to direct the WCAB not to act in excess of its statutorily-conferred powers or in a manner which is unconstitutional. (*Fidelity & Cas. Co., supra*, at pp. 1008-1009: “Mandamus will lie to compel the performance of an act which the law specifically enjoins ... This case goes to the heart of the procedural duties by which the WCAB is statutorily and constitutionally enjoined to conduct its business and which confine the exercise of its discretion.” [internal citation omitted].)

In *Betancourt*, the Court of Appeal held that issuance of a peremptory writ of mandate was properly granted to compel the Board to discharge a mandatory, non-discretionary legal duty. (*Betancourt, supra*, at pp. 412-413.) Similarly, in *Chiang*, the Court of Appeal held that a petition for writ of mandate is appropriate when it is alleged that an administrative agency is enforcing an “underground regulation”. (*Chiang, supra*, at pp. 809.)

Petitioners assert that, pursuant to the above-cited statutory and decisional authority, the issuance by this Court of the requested writ of mandate is proper for all of the following reasons: (a) Petitioners are precluded from seeking the relief requested by way of this Petition in the Superior Court since such relief, if granted, would “interfere” with the performance by the Board of its statutorily-granted duties; (b) Petitioners seek an order directing the WCAB to vacate the “grant and study” orders issued in their underlying cases and in all other cases in which such orders have been issued and have not been rendered moot on the grounds that all such orders are unconstitutional and are in excess of the statutorily-granted powers of the Board; (c) Petitioners seek an order directing the WCAB to discharge its mandatory, ministerial duty to issue final decision

regarding the petitions for reconsideration filed in Petitioners' underlying workers' compensation cases within sixty-day time limit provided for in Labor Code sections 5315 and 5909; and (d) Petitioners assert that the WCAB's "grant and study" order procedure constitutes an unlawful "underground regulation".

C. Venue is Proper in this Court

Unless otherwise provided for by statute, the rules regarding venue pertaining to other civil action apply to actions against state agencies. (*Karst, supra*, at p. 534.) For purposes of a petition for writ of mandate against an agency such as the WCAB, venue is governed by Code of Civil Procedure section 393, subsection (b). (*Id.*, at pp. 537-541.) When considering venue issues, the courts have a duty to liberally construe the statutory provisions applicable to actions against state agencies consistent with their underlying purpose, namely, "to afford to the citizen a form that is not so distant and remote that access to it is impractical and expensive." (*Id.*, at pp. 536-537.)

Pursuant to Section 393, in a case such as this one which involves multiple aggrieved parties, venue is proper in a county where all or part of the effects of the challenged action of the state

agency are “felt” by the aggrieved parties. (*Id.*, at pp. 538-542: “‘It is where the shaft strikes, not where it is drawn, that counts.’” [quoting *Cecil v. Superior Court*, 59 Cal. App. 2d 793, 799 (1943)].) Where venue is proper in more than one county, the plaintiff (or petitioner) has the right to choose among the available options, and her or his choice is presumed to be proper. (*Crestwood Behavioral Health, Inc. v. Superior Court*, 60 Cal. App. 5th 1069, 1075 (2021).)

All of the Petitioners, save Petitioner EARLEY, reside in Los Angeles County, and the effects of the WCAB’s “grant and study” orders are being “felt” by them in such county. Since Los Angeles County is within the territorial boundaries of this Court, Petitioners’ choice of this Court as the venue for these proceedings is proper and is presumptively correct.

D. This Petition is Timely Filed

The timeliness of a petition seeking a common law writ, such as a writ of mandamus, is not determined by application of any statutory filing deadline but rather according to equitable principles given that a court’s authority to grant the writ derives from its equitable powers. (*Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2020) ¶ 15:145, p. 15-91,

citing *H.D. Arnaiz, Ltd. v. County of San Joaquin*, 96 Cal. App. 4th 1357, 1368 (2002).) Unless a specific filing deadline is provided for by statute, an appellate court may consider a petition seeking a common law writ at any time, subject to the court's discretionary power to deny relief based upon laches. (*Sturm, supra.*) To deny relief on the grounds of laches in the context of a common law writ petition, the court must find not only unreasonable delay by the petitioning party but also that such delay resulted in actual prejudice to the opposing party. (*Peterson v. Superior Court*, 31 Cal. 3d 147, 163 (1982).)

Petitioners assert that there is no credible basis upon which Real Parties in Interest could articulate a claim that they have been prejudiced by the time periods which have passed between the issuance of the "grant and study" orders issued in Petitioners' underlying workers' compensation cases and the filing of this Petition.

While courts often apply a judicially-adopted "60-day rule", the timeliness of the petition ultimately depends upon the nature of the right asserted or the obligation sought to be enforced. (*Allen, supra*, at p. 884; *Kao, supra*, at p. 1332). In *Allen*, the petitioner requested a writ of mandate directing a county board of supervisors and a

county planning commission to revoke and annul a variance which had been granted from a county zoning ordinance. (*Allen, supra*, at p. 878.) Respondent, who had been granted the variance, opposed the petition on various grounds including that it was barred by the statute of limitations. (*Id.*, at p. 880.) The Court held that, since the right sought to be enforced by petitioner did not “fall within the compass of any specific statute of limitation”, the petition was subject to the four-year statute of limitations provided in Code of Civil Procedure section 343 (*Id.*, at pp. 884-885.)

In *Kao*, the petitioner sought a writ of mandate directing the Department of Corrections and Rehabilitation (“Department”) to process a disciplinary appeal. (*Kao, supra*, at p. 863.) The Department asserted that the “60-day rule” rendered his petition untimely. Petitioner, on the other hand, asserted that his petition was subject to the four-year statute of limitations provided in Code of Civil Procedure section 343. The Court disagreed with both positions and held that the three-year statute of limitations provided in Code of Civil Procedure section 338, subdivision (a), applied. (*Id.*, at pp. 1329-1330.)

In support of its conclusion, the Court in *Kao* observed that the “60-day rule” is not statutory but is, rather: “a judicially created rule used presumptively by appellate courts to assess the timeliness of non-statutory writ petitions seeking discretionary review of trial court decisions” whose purpose is “to keep the time period for seeking writ review on par with the time period for seeking appellate review, absent extraordinary circumstances.” (*Id.*, at p. 1333.) From these premises, the Court concluded that it was precluded from applying the “60-day rule” since the petitioner was not seeking review of a discretionary decision by the Department and no statute expressly provided that his petition was subject to this limitations period. (*Ibid.*) The Court ultimately held that the three-year statute of limitations provided in Code of Civil Procedure section 338, subdivision (a), applied to the petition at issue since: “the gravamen of [the] petition is to compel the Department to comply with a statutory obligation.” (*Id.*, at p. 1334.)

Labor Code section 5950, which pertains to petitions for review of decision made by the WCAB following reconsideration, specifically provides that any such petition must be filed within forty-five (45) days of the challenged decision. (“The application for writ

of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration." *Lab. Code, § 5950.*) Conversely, Labor Code section 5955, which pertains to petitions for writ of mandate such as the present Petition, is silent as to any limitations period. Since the Legislature provided for a specific limitations period in Section 5950 but did not do so in Section 5955, the lack of inclusion of a limitations period in the latter is presumed to be intentional. (*Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 894 (2001): "Where the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended. This concept merely restates another statutory construction canon: we presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language."; *see also People v. Griffis*, 212 Cal. App. 4th 956, 964-965 (2013) [omission of a particular requirement in a statute must be presumed to be intentional].)

Based upon the reasoning and holdings in *Allen* and *Kao*, Petitioners assert: (a) that the “60-day rule” does not apply in this case; and (b) that, if the Court were to find that this Petition is, in fact, subject to a specific limitations period, that period would be either the three (3) year statute of limitations provided for in Code of Civil Procedure section 338, subdivision (a), or the four (4) year statute of limitations provided for in Code of Civil Procedure section 343.

Accordingly, whether determined by the “laches standard” as articulated in *Sturm*, or the limitations periods found applicable in *Allen* and *Kao*, this Petition is timely filed.

II. SUBSTANTIVE ISSUES

A. Standard of Review

Petitioners challenge the constitutionality of the WCAB’s “grant and study” procedure. This issue is subject to de novo review. (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward*, 200 Cal. App. 4th 81, 90 (2011); *Bautista v. County of Los Angeles*, 190 Cal. App. 4th 869, 875 (2010)). Petitioners also challenge the Board’s interpretation and application of the Labor Code provisions defining the time limits for it to take action upon petitions for reconsideration. These issues are, likewise, subject to de novo

review. (*Smith v. LoanMe, Inc.*, 11 Cal. 5th 183, 190 (2021)). Additionally, Petitioners contend that the WCAB's adoption of and continuance adherence to its "grant and study" procedure constitutes an impermissible and unlawful "underground regulation". This issue is also subject to de novo review. (*Malaga County Water Dist. v. Central Valley Regional Water Quality Control Bd.*, 58 Cal. App. 5th 418, 435-436 (2020).)

B. The WCAB's "Grant and Study" Procedure is Unconstitutional Since It Impedes the Mandated Expeditious Resolution of Disputes in Workers' Compensation Cases

The California workers' compensation system is predicated upon a presumed "compensation bargain" pursuant to which the employer assumes liability for work-related injuries suffered by their employees without regard to fault in exchange for limitations on the amount of that liability. The employee, in turn, is entitled to "swift and certain" delivery of benefits in exchange for giving up the right to seek general tort damages. (*Vacanti v. State Comp. Ins. Fund*, 24 Cal. 4th 800, 811 (2001).)

This "compensation bargain" is a direct reflection of the provisions of Article XIV, Section 4, of our state Constitution, portions

of which were discussed in the Introduction to this Petition and which bear repeating:

The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation ... and **full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the state government.**

(Emphasis added.)

Clearly, then, the expeditious resolution of all disputes in workers' compensation cases is an expressly adopted public policy objective in this state, and it is the duty of the WCAB to advance and achieve that objective. Indeed, the Board itself has expressly recognized that expeditious dispute resolution is "constitutionally required" and is "essential" to the proper functioning of the California workers' compensation system. (*Neff v. Vega*, 34 Cal. Comp. Cases 333, 337 (1969) [*en banc*].)

Petitioners submit that the WCAB's "grant and study" procedure, which indefinitely delays final decisions regarding the merits of petitions for reconsideration filed with the Board, is the very

antithesis of the “constitutionally required” and “essential” expeditious resolution of disputes. Petitioners further submit that the WCAB’s unconstitutional “grant and study” procedure strikes at the very core of the “compensation bargain”.

As discussed *supra*, the prejudice to all parties to workers’ compensation cases, but especially to injured workers, which results from “grant and study” orders goes far beyond an indefinite delay in obtaining final decisions regarding the issues submitted for reconsideration. While such a final decision is pending, the parties are precluded from seeking and obtaining an adjudication of any additional disputes which may arise in their respective cases. (*Rosendin, supra*, at p. 1125 [workers’ compensation judge loses jurisdiction to adjudicate further issues after the Board issues an order granting of reconsideration].)

Where, as in the case of its “grant and study” orders, the WCAB undertakes any action which is unconstitutional, a writ of mandate is appropriate and warranted to compel the Board to annul that action. (*Fidelity & Cas. Co., supra*.)

As discussed *infra*, no appellate court has, to date, issued a published decision, supported by a written opinion, validating the

Board's "grant and study" procedure as constitutional. Petitioners submit this Court must seize upon the opportunity to "step into the breach" and issue such a decision in this case.

C. By Issuing "Grant and Study" Orders the WCAB Exceeded Its Statutorily-Granted Powers

1. The WCAB is a Tribunal of Limited Jurisdiction

Although the WCAB exercises all judicial functions within the California workers' compensation system, *Lab. Code § 111*, it is a tribunal of limited jurisdiction with no powers beyond those vested in it by Article XIV, Section 4, of our state Constitution and the provisions of the Labor Code. (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.*, 153 Cal. App. 3d 965, 970 (1984).)

2. The "Grant and Study" Orders Violate Labor Code sections 5315 and 5909

Labor Code section 5315 provides:

Within 60 days after the filing of the findings, decision, order or award, the appeals board may confirm, adopt, modify or set aside the findings, order, decision, or award of a workers' compensation judge and may, with or without further proceedings, and with or without notice, enter its order, findings, decision, or award based upon the record in the case.

Labor Code section 5909 provides: "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 of filing."

When called upon to interpret a statute, a reviewing court's primary task is to effectuate the Legislature's purpose in enacting the statute. The court's inquiry must begin with the actual language of the statute as the "most reliable indicator" of legislative intent. (*People v. Pennington*, 3 Cal. 5th 786, 795 (2017).) If the statutory language is clear and unambiguous, the "plain meaning" of that language governs, and there is no need for statutory construction. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouse, LLC*, 61 Cal. 4th 830, 838 (2015).)

According to its "plain meaning", Section 5315: (a) permits the WCAB to review a trial-level finding, order or decision by a workers' compensation judge and expressly limits the period of time within which the Board may conduct its review to 60 days of the filing of such a finding, order or decision; and (b) expressly identifies what actions the Board is permitted to take after conducting its review, namely, either to "confirm, adopt, modify or set aside" such a finding, order or decision or to "enter its order, findings, decision, or award based upon the record in the case". **Granting itself an extension of time (indefinite or otherwise) "for further study" before rendering its decision regarding the merits of a petition for reconsideration is**

not one of the actions which Section 5315 authorizes the WCAB to take. Preclusion of such an option is consistent with the principle of *expressio unius est exclusio alterius*. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1391 (1987), fn. 13: “*Expressio unius est exclusio alterius* means that “the expression of certain things in a statute necessarily involves exclusion of other things not expressed”[quoting *Henderson v. Mann Theatres Corp.*, 65 Cal. App. 3d 397, 403 (1976).])

Turning to Section 5909, it would be difficult to conceive of a statute whose meaning is more evidently clear. Nothing in the language of this statute supports the proposition that the WCAB may grant itself an extension of time for action upon a petition for reconsideration beyond the 60-day time period afforded by the Legislature. As such, the “plain meaning” of Section 5909 limits the time period within which the WCAB may lawfully take one of the actions set forth in Section 5315 upon the filing of a petition for reconsideration to 60 days.

Similarly, the legislative history pertaining to Section 5909 clearly demonstrates that the 1992 amendment to this statute was intended to completely eliminate the WCAB’s discretionary authority

to grant itself extensions of the 60-day limit. The legal principles embodied in Section 5909 first became part of the workers' compensation laws of this state in 1913 as part of the Boynton Act. Section 81, subdivision (f), of the 1913 Act provided, in relevant part:

An application for a rehearing shall be deemed to have been denied by the commission unless it shall have been acted upon within thirty days from the date of filing; *provided, however*, that the commission may, upon good cause shown therefor, extend the time within which it may act upon such application for not exceeding 30 days.

(Stats. 1913, ch. 176, p. 43 [italics in original].)

This language remained essentially unchanged and was eventually enacted as part of the original Labor Code in 1937. Section 5909, as originally enacted, provided:

A petition for a rehearing shall be deemed to have been denied by the commission unless it shall have been acted upon within thirty days from the date of filing. The commission may, upon good cause being shown therefor, extend the time within which it may act upon such petition for not exceeding 30 days.

(Stats. 1937, ch. 90, p. 128.)

No significant modifications were made to Section 5909 until 1992, when it was amended to read, as it does to this day: "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 of filing." (*Stats.*

1992, ch. 1226, p. 5766.) Perhaps the most telling expression of the intent behind the 1992 amendment to Section 5909 can be found in the enrolled bill report authored by the Department of Industrial Relations which stated:

Under existing law, a petition for reconsideration is deemed to have been denied by the Workers' Compensation Appeals Board unless acted upon within 30 days from the date of filing subject to a 30-day extension for good cause.

This bill would instead deem that petition denied unless acted upon within 60 days from the date of filing **and would delete the provision authorizing an extension.**

*(Department of Ind. Relations enrolled bill report dated September 8, 1992 [emphasis added].)*⁷

Indeed, the amendment to Section 5909 as part of the 1992 legislation was requested by the Department of Industrial Relations ("DIR") itself. In a letter to Assembly Member Conroy, the author of the 1992 legislation, the DIR Deputy Director for Legislative Affairs wrote:

Enclosed are the amendments we would like to have incorporated into AB-3758.

Specifically, we wish to amend/ add the following Labor Code sections:

⁷ Exhibit "A" to Petitioner's Motion for Judicial Notice ("MJN") filed contemporaneously herewith.

1. Section 62.S(b), to adjust employer assessment formula in 1992-93 to collect in aggregate no less than 1991-92.
2. Section 127(e), to allow collection of reasonable filing fees.
3. Section 5502(d), to allow workers' compensation judges to conduct settlement conferences.
4. Section 5909, to allow WCAB 60 days to act on petitions for reconsideration.

(Department of Ind. Relations letter to Ass. Member Conroy dated August 27, 1992.)⁸

The Senate Industrial Relations Committee analysis of the 1992 legislation confirmed the Legislature's intent to eliminate the WCAB's ability to grant itself extensions of time to act upon petitions for reconsideration. (*Sen. Ind. Relations Comm. Analysis* [undated]: ["The amendments: ... Repeal a provision permitting the appeals Board to extend the time that it must act on a petition for reconsideration of a decision by a worker's compensation judge for good cause shown."].⁹

Petitioners expect that the WCAB may rely upon the decisions in *Keil; Palomares v. Workers' Comp. Appeals Board*, 43 Cal. Comp. Cas. 945 (1978) (*writ denied*) ("Palomares"); *Carivau v. Workmen's Comp. App.*

⁸ Exhibit "B" to Petitioners' MJN.

⁹ Exhibit "C" to Petitioners' MJN.

Bd., 34 Cal. Comp. Cas. 134 (1969)(*writ denied*)(“*Carivau*”); and *Dill v. Workmen’s Comp. App. Bd.*, 34 Cal. Comp. Cas. 148 (1969)(*writ denied*)(“*Dill*”) as support for the lawfulness of its “grant and study” procedure. However, *Keil*, *Palomares*, *Carivau* and *Dill* are of very little, if any, precedential value in these proceedings. The Court of Appeal did not issue a written decision in any of these cases in conjunction with its denials of the requested writs, and since “writ denied” decisions constitute, at most, persuasive authority for purposes of the WCAB (*MacDonald v. Western Asbestos Company*, 47 Cal. Comp. Cas. 365 (1969)[*en banc*]), such decisions are *a fortiori* of even lesser authority in this Court.

Of equal (if not more) importance, *Keil*, *Carivau* and *Dill* were decided before the 1992 amendment to Labor Code section 5909 which, as discussed *infra*, eliminated the Board’s prior discretion to grant itself extensions of time to act upon petitions for reconsideration. Moreover, as further discussed *infra*, Petitioners assert that the WCAB’s apparent interpretation, as referenced in *Keil*, that the phrase “acted upon” as set forth in Section 5909 means and includes taking any action at all in response to the filing of a petition

for reconsideration, including the issuance of “grant and study” orders constitutes an unlawful “underground regulation”.

As discussed *supra*, when the WCAB takes an action in excess of its statutorily-conferred powers, a writ of mandate is appropriate and warranted to compel the Board to annul that action. (*Fidelity & Cas. Co., supra.*)

D. The WCAB Should be Compelled to Comply with Its Mandatory, Non-Discretionary Duty to Decide the Merits of Petitions for Reconsideration Within 60 Days

Code of Civil Procedure section 1085, subdivision (a), expressly authorizes the issuance of a writ of mandate to compel a tribunal such as the WCAB to perform an act required by law. As discussed *supra*, Labor Code sections 5315 and 5909 impose a mandatory, non-discretionary duty upon the Board to render decisions regarding the merits of petitions for reconsideration within 60 days. In Petitioners’ cases and in all other cases in which “grant and study” orders have been issued, the Board failed to discharge that mandatory, non-discretionary duty. This Court should grant the requested writ of mandate compelling the WCAB to comply with that duty which, in turn, would require the Board to vacate the “grant and study” orders issued in Petitioners’ underlying workers’ compensation cases and all

other such “grant and study” orders that have not been rendered moot.

E. The WCAB’s “Grant and Study” Procedure Constitutes An Unlawful “Underground Regulation”

Subject to certain exceptions, the WCAB is subject to the provisions of the APA (*Rea, supra*, at p. 646; *Gov’t. Code*, § 11351), including Government Code section 11342.600 which defines a regulation as “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” (*Rea, supra*, at p. 647.) In *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996), our Supreme Court stated that a “regulation” has two defining characteristics:

First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided ... Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.”

(*Id.*, at p. 571 [internal citation omitted].)

Absent an express exception, the APA applies to all interpretations of a statute generally applied by an administrative agency, provided that the agency is subject to the APA, (*Morning Star Co. v. Bd. of Equalization*, 38 Cal. 4th 324, 335 (2006), including unwritten policies of such an agency. (*Capen v. Shewry*, 155 Cal. App. 4th 378, 386 (2007).)

Petitioners submit that the WCAB's "grant and study" procedure bears all of the above indicia of a "regulation". First, it is undeniably a rule adopted by the Board which constitutes an interpretation of the phrase "acted upon" as provided for in Labor Code section 5909. Second, it is a rule of general application employed by the WCAB on an *ad hoc*, discretionary basis (for reasons known only to the Board itself) to determine whether or not a final decision regarding the merits of a petition for reconsideration will be decided within the 60-day time period specified in Labor Code sections 5315 and 5909. Finally, the "grant and study" procedure does not fall within any statutory exception to the requirements of the APA.

The WCAB's administrative rulemaking authority is subject to Labor Code section 5307. Subdivision (a) provides in relevant part: "The appeals board may, by an order signed by four members, do all of the following: (1) Adopt reasonable and proper rules of practice

and procedure” Subdivision (b) provides in relevant part: “No rule or regulation of the appeals board pursuant to this section shall be adopted, amended, or rescinded without public hearings.”

Whereas the WCAB has adopted numerous regulations in recent years (and has done so as recently as December 2021), included among them numerous regulations regarding petitions for reconsideration, only one such regulation purports to justify “grant and study” orders. Regulation 10580, entitled “Petition Appealing Medical Provider Network Determination of the Administrative Director”, provides in subdivision (k): “The assigned panel of the Appeals Board shall determine when the petition is submitted for decision. Within 60 days after submission, the panel shall render a decision on the petition unless, within that time, the panel orders that the time be extended so that it may further study the facts and relevant law.” As such, the WCAB’s utilization of the “grant and study” procedure with respect to a petition for reconsideration involving any other issue constitutes an unlawful “underground regulation”.

None of the petitions for reconsideration filed in Petitioners’ underlying workers’ compensation cases is subject to Regulation

10580, thus rendering the Board's interpretation of Section 5909 as embodied in these "grant and study" orders void and not entitled to any deference by this Court. (*Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542, 556 (2018).) Accordingly, this Court must independently determine whether the WCAB's interpretation of Section 5909 is valid. (*Id.*, at p. 557.) Petitioners submit that, based upon all of the reasons discussed *supra*, this Court should reject the Board's interpretation.

F. This Court Should Declare that the WCAB's "Grant and Study" Procedure is Unlawful, Should Direct the Board to Rescind All "Grant and Study" Orders Which Have Not Become Moot and Should Order the WCAB to Provide a Timetable for Issuance of Final Decisions

As Petitioners have more than sufficiently demonstrated, proper grounds clearly exist for this Court to issue the requested writ of mandate: (a) declaring that the WCAB's "grant and study" procedure is unlawful; (b) directing the WCAB to vacate all "grant and study" orders which have not been rendered moot; and (c) directing the WCAB to provide a timetable for issuance of decisions on the merits of the petitions for reconsideration issued in all such cases.

G. This Court Should Also Award Reimbursement of Petitioners' Attorneys' Fees Pursuant to Code of Civil Procedure section 1021.5

Code of Civil Procedure section 1021.5 provides, in relevant part:

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities

Where an action seeks to vindicate a public policy of constitutional stature or to enforce a statutory obligation, the requirement of an important right affecting the public at large for purposes of Section 1021.5 is established. (*Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 318 (1983); *California Common Cause v. Duffy*, 200 Cal. App. 3d 730, 745 (1987).) Petitioners submits that this element is clearly satisfied for the reasons set forth *supra*.

In determining whether an action has conferred a "substantial benefit", the court must consider the significance of the benefit

conferred, as well as the size of the class of persons who receive that benefit “from a realistic perspective” and in light of the totality of the relevant circumstances. (*Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 939 – 940 (1979) (“*Woodland Hills*”).) As discussed *supra*, the WCAB’s “grant and study” procedure jeopardizes the health and welfare of all injured workers in whose cases such orders have been issued and denies the expeditious resolution of disputes guaranteed by our state Constitution to all litigants in workers’ compensation cases. Petitioners assert that the large number of injured workers detrimentally affected by “grant and study” order is established by the data provided by the Board itself in its response to the CPRA request. For these reasons, Petitioners submit that a successful outcome in these proceedings would, indeed, confer the necessary “substantial benefit”.

Finally, since this Petition seeks non-pecuniary relief, Petitioners need not make an affirmative showing regarding the final element of the analysis pursuant to Section 1021.5, namely, “the necessity and financial burden of private enforcement”. (*Woodland Hills, supra*, at pp. 934 – 935; *Weiss v. City of Los Angeles*, 2 Cal. App. 5th 194, 218 (2016).)

Accordingly, Petitioners submit that this Petition represents a “textbook case” wherein an award of attorneys’ fees pursuant to Section 1021.5 is appropriate and warranted.

CONCLUSION

Based upon the foregoing, this Court should grant the relief requested by Petitioners.

Dated: MARCH 4, 2022

Respectfully submitted,

/s/ CHARLES R. RONDEAU
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/s/ THOMAS F. MARTIN
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the foregoing PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF; VERIFICATION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES is proportionately spaced, has a typeface of 13 points or more, and, exclusive of the Tables of Contents, the Table of Authorities, the Certificate of Interested Parties, and this Certificate of Compliance, contains 11,928 words according to Microsoft Windows 2016, the word processing program used to prepare this document, which is within the word limit set forth in Rule 8.204(c)(1).

Dated: MARCH 4, 2022

Respectfully submitted,

/s/ CHARLES R. RONDEAU

Charles R. Rondeau

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
✓ Federal Express

I, Stephen Moore, declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

On 3/4/2022 declarant served the within: Petition for Writ of Mandate; Exhibits in Support of Petition for Writ of Mandate
upon:

Copies	FedEx	USPS
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1	Copies	✓	FedEx	USPS
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I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and** copies has/have been filed by third party commercial carrier for next business day delivery to:

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Second Appellate District, Pre-Division (Writs)
Ronald Reagan State Building
300 South Spring Street, Second Floor
Los Angeles, California 90013

I declare under penalty of perjury that the foregoing is true and correct:

Signature: /s/ Stephen Moore

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