

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 STATE OF CALIFORNIA

3
4 **MARIO ALMARAZ,**

5 *Applicant,*

6 vs.

7 **ENVIRONMENTAL RECOVERY SERVICES**
8 **(a.k.a. ENVIROSERVE); and STATE**
9 **COMPENSATION INSURANCE FUND,**

10 *Defendant(s).*

Case No. ADJ1078163 (BAK 0145426)

**ORDER GRANTING
RECONSIDERATION
AND
ORDER ALLOWING
AMICUS BRIEFS
(EN BANC)**

11 **JOYCE GUZMAN,**

12 *Applicant,*

13 vs.

14 **MILPITAS UNIFIED SCHOOL DISTRICT,**
15 **Permissibly Self-Insured; and KEENAN &**
16 **ASSOCIATES, Adjusting Agent,**

17 *Defendant(s).*

Case No. ADJ3341185 (SJO 0254688)

**ORDER GRANTING
RECONSIDERATION
ON BOARD MOTION,
AND
ORDER ALLOWING
AMICUS BRIEFS
(EN BANC)**

18 On February 3, 2009, the Appeals Board consolidated these cases and issued a joint en
19 banc decision on the issue of rebutting the AMA Guides portion of the 2005 Schedule for Rating
20 Permanent Disabilities.

21 On February 27, 2009, defendant, State Compensation Insurance Fund (SCIF) filed a
22 timely petition for reconsideration in *Almaraz*. In *Guzman*, however, no timely petition for
23 reconsideration was filed.¹

24 For the reasons that follow, we will grant SCIF's petition for reconsideration in *Almaraz*
25 and, concurrently, we will grant reconsideration on our own motion in *Guzman*. We will give the
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27 ¹ On March 19, 2009, the Milpitas Unified School District (the defendant in *Guzman*), did file a timely petition for writ of review with the Court of Appeal, Sixth Appellate District (6th Civ. No. H034001).

1 parties in *Guzman* until 5pm on Friday, May 1, 2009 to file briefs on the merits and to serve those
2 briefs on opposing counsel in that case. We also will give any interested person or entity until
3 5pm on Friday, May 1, 2009 to file an amicus curiae brief and to serve that brief on all counsel in
4 both the *Almaraz* and *Guzman* cases.² Finally, we will give each counsel in the *Almaraz* and
5 *Guzman* cases until 5pm on Thursday, May 21, 2009 to file a single consolidated reply brief that
6 responds to all of the amicus briefs. These time limitations for filing mean that a brief must be
7 received by the Appeals Board by the applicable deadline, and not merely posted by that deadline.
8 (Cal. Code Regs., §§ 10845(a), 10230(a).) Untimely briefs will not be considered.

9 Preliminarily, in granting reconsideration, we conclude that our February 3, 2009 joint en
10 banc decision constitutes a “final” order.³

11 A petition for reconsideration is properly taken only from a “final” order, decision, or
12 award. (Lab. Code, §§ 5900(a), 5902, 5903.) Generally, a “final” order is one “which determines
13 any substantive right or liability of those involved in the case.” (*Rymer v. Hagler* (1989) 211
14 Cal.App.3d 1171, 1180 (*Rymer*); *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)*
15 (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413] (*Pointer*).) Accordingly,
16 where – as here – the Appeals Board grants reconsideration, rescinds the decision of the WCJ, and
17 returns the matter to the WCJ for further proceedings and a new decision, the Appeals Board’s
18 action generally is not deemed a “final” order. (Cf. *Travelers Ins. Co. v. Workers’ Comp. Appeals*
19 *Bd. (Taylor)* (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774, 775, fn. 3]
20 (*Taylor*) (“a petition seeking review of a [WCAB] order which remands a matter to the trial judge
21 for further proceedings is ordinarily premature”).)

22 However, an interlocutory WCAB decision may be deemed a “final” order if it determines
23 a “threshold” issue. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-
24 1081 [65 Cal.Comp.Cases 650, 653-660] (*Maranian*); *Aldi v. Carr, McClellan, Ingersoll,*
25

26 ² The addresses for counsel are set forth beneath the service declaration at the end of this opinion.

27 ³ We observe, however, that an Appeals Board decision need not be “final” for the Board to grant reconsideration on its own motion. (See Lab. Code, § 5911; see also §§ 5900(b), 5315.)

1 *Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784 (Appeals Board en banc) (*Aldi*.) A
2 “threshold” issue has variously been described as “a substantial issue fundamental to the ... claim
3 for benefits,” “an issue critical to the claim for benefits,” or “an issue that is basic to the
4 establishment of the ... right[] to benefits.” (*Maranian, supra*, 81 Cal.App.4th at pp. 1070, 1075
5 [65 Cal.Comp.Cases at pp. 651, 655]; *Aldi, supra*, 71 Cal.Comp.Cases at p. 784.)⁴ If a WCAB
6 decision resolves a “threshold” issue, then it is a “final” decision, whether or not all issues are
7 resolved or there is an ultimate decision on the right to benefits. (*Milbauer, supra*, 127
8 Cal.App.4th at p. 642 [70 Cal.Comp.Cases at p. 326]; *Aldi, supra*, 71 Cal.Comp.Cases at p. 784.)

9 Here, the question of whether the AMA Guides portion of the 2005 Schedule may be
10 rebutted is a “threshold” issue that is “fundamental,” “critical,” and “basic” to the issue of
11 permanent disability benefits. Therefore, we will treat our February 3, 2009 decision as a “final”
12 order. (Cf. *Aldi, supra*, 71 Cal.Comp.Cases at p. 784.)

13 Having determined that our February 3, 2009 decision is a “final” order, we will grant the
14 petition for reconsideration filed by SCIF in *Almaraz*. Taking into consideration the statutory time
15 constraints for acting on SCIF’s petition (Lab. Code, § 5909), we conclude that reconsideration
16 must be granted to afford us a sufficient opportunity to study the issues raised in SCIF’s petition –
17 as well as in applicant’s answer – so that we may issue a just and reasoned decision.

18 We also will grant reconsideration on our own motion in *Guzman*. (Lab. Code, § 5911; see
19 also §§ 5900(b), 5315.) Because our February 3, 2009 en banc decision related to both *Almaraz*

21 ⁴ Examples of “threshold” issues include: whether there was an industrial injury (*Pointer, supra*, 104
22 Cal.App.3d at pp. 533-534); whether an injury should be statutorily presumed to be compensable (*Maranian, supra*,
23 81 Cal.App.4th at pp. 1070, 1080-1081); whether there is an employment relationship between the injured claimant
24 and the defendant (*Taylor, supra*, 147 Cal.App.3d at p. 1036); whether the employee’s claim is barred by the statute of
25 limitations (*Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43
26 Cal.Comp.Cases 661]); whether the WCAB has personal or subject matter jurisdiction (*Rea v. Workers’ Comp.
27 Appeals Bd. (Milbauer)* (2005) 127 Cal.App.4th 625, 642 [70 Cal.Comp.Cases 312] (*Milbauer*); *Dept. of Justice v.
Workers’ Comp. Appeals Bd. (Jones)* (1989) 213 Cal.App.3d 194, 198 [54 Cal.Comp.Cases 298]); whether the
defendant can be relieved of some or all of its workers’ compensation liability by receiving credit for monies the
employee received outside the workers’ compensation system (*Graham v. Workers’ Comp. Appeals Bd.* (1989) 210
Cal.App.3d 499, 503 [54 Cal.Comp.Cases 160]; *Kosowski v. Workers’ Comp. Appeals Bd.* (1985) 170 Cal.App.3d
632, 636 [50 Cal.Comp.Cases 427]); and whether an expert witness should be permitted to testify. (*Grupe Co. v.
Workers’ Comp. Appeals Bd. (Ridgeway)* (2005) 132 Cal.App.4th 977, 980-981 [70 Cal.Comp.Cases 1232].) Also,
dismissing a party, rejecting an affirmative defense, terminating liability, or determining insurance coverage may
constitute “threshold” issues. (*Maranian, supra*, 81 Cal.App.4th at p. 1075; *Rymer, supra*, 211 Cal.App.3d at p. 1180.)

1 and *Guzman*, we conclude that these two cases are inextricably intertwined. (Cf. *General Ins. Co.*
2 *of America v. Workers' Comp Appeals Bd. (Sale)* (1980) 104 Cal.App.3d 278, 282-285 [45
3 Cal.Comp.Cases 403, 406]; 2 Cal. Workers' Compensation Practice (Cont.Ed.Bar 4th ed. June
4 2008 update), § 21.67, p. 1660.) Thus, a failure to grant reconsideration in *Guzman* on our own
5 motion might conceivably lead to inconsistent results if, on reconsideration, we ultimately decide
6 to rescind, alter, or amend the February 3, 2009 decision. (See Lab. Code, §§ 5906, 5907,
7 5908(a).) Although inconsistent results are never preferable, they certainly should not occur in the
8 context of an en banc decision – which, of course, constitutes binding precedent on all Appeals
9 Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp.*
10 *Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5];
11 *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases
12 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

13 Because we are granting reconsideration on our own motion in *Guzman*, we will give the
14 parties to that case until 5pm on Friday, May 1, 2009 to file briefs on the merits, if they so choose.
15 Any such briefs shall be concurrently served on opposing counsel in the *Guzman* case. These
16 briefs shall be subject to the 25-page limitation of WCAB Rule 10845(a) (Cal. Code Regs., tit. 8, §
17 10845(a); see also § 10232(a)(10)) and they shall comply with the form and size requirements of
18 Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except that the parties need not
19 comply with the provisions of Rule 10845(a) that relate to document folding and stapling,
20 document cover sheets, and documents separator sheets (see § 10232(a)(11) and (b)). This is
21 because we will order that these briefs be filed directly with the Appeals Board, and not with any
22 district office. The Appeals Board will process these documents and scan them into EAMS.

23 Furthermore, in accordance with our broad powers on reconsideration (Lab. Code, § 133),
24 we will allow any interested persons or entities to file amicus curiae briefs on the issues addressed
25 by our joint en banc opinion in *Almaraz* and *Guzman*. Any such amicus briefs shall be filed by no
26 later than 5pm on Friday, May 1, 2009. All amicus briefs shall concurrently be served on all
27 counsel for the parties in both the *Almaraz* and *Guzman* cases. We are allowing the submission of

1 amicus briefs because we are aware that our en banc decision has been the subject of much
2 comment and debate in the workers' compensation community and even the broader public.
3 Therefore, we infer there may be significant interest in filing amicus briefs. Also, we believe that
4 amicus curiae briefs may aid our deliberations by giving us a broader perspective on the issues, by
5 assisting us in analyzing those issues, and by helping to ensure that all sides of those issues are
6 fairly and completely presented. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 792, fn. 10;
7 *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1435.)
8 However, any interested person or entity filing an amicus curiae brief must file a single document
9 that relates jointly to both *Almaraz* and *Guzman*, i.e., we will not accept separate amicus briefs in
10 each case. The amicus briefs shall not exceed 15 pages and they shall comply with the form and
11 size requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except, as
12 above, the amicus briefs need not comply with the provisions of Rule 10845(a) that relate to
13 document folding and stapling, document cover sheets, and documents separator sheets (see §
14 10232(a)(11) and (b)). Any amicus brief not complying with all of these requirements shall not be
15 accepted for filing or deemed filed and will be discarded without notification to the filing person
16 or entity. We note that, for the benefit of any potential amicus, we have posted copies of SCIF's
17 petition for reconsideration and request for judicial notice and of applicant's answer on our
18 website at http://www.dir.ca.gov/wcab/wcab_info_wcc.htm.

19 After the period for filing amicus briefs has elapsed, counsel in the *Almaraz* and *Guzman*
20 cases will each be given until 5pm on Thursday, May 21, 2009 to file a reply brief that responds to
21 all of the amicus briefs – that is, each counsel may file a single consolidated reply brief. The reply
22 briefs shall not exceed 15 pages and they shall comply with the form and size requirements of Rule
23 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except, as above, they need not comply
24 with the provisions of Rule 10845(a) that relate to document folding and stapling, document cover
25 sheets, and documents separator sheets (see § 10232(a)(11) and (b)). The parties' replies to the
26 amicus briefs shall be served on their opposing counsel in the *Almaraz* and *Guzman* cases,
27 respectively, but the replies need not be served on amicus.

1 Any brief, whether filed by a party or by an amicus, which requests that the Appeals Board
2 take judicial notice of legislative history shall comply with all of the following requirements:
3 (1) the brief shall append a copy of the matter to be judicially noticed or explain why it is not
4 practicable to do so; (2) the body of the brief shall *quote* the specific language of legislative
5 history that the party or amicus seeks to be judicially noticed and it shall specifically identify
6 where in the document the quoted language appears (e.g., “Sen. Com. on Labor and Industrial
7 Relations, Analysis of Sen. Bill No. 714 (2003-2004 Reg. Sess.) as amended Apr. 21, 2003, pp. 1-
8 2”) (cf. Cal. Code Regs., tit. 8, § 10842(b)); and (3) the body of the brief shall explain why the
9 matter to be judicially noticed is relevant. The appended legislative history documents shall not
10 count toward the page limitations set out above, however, the requisite quoted language and
11 explanation of its relevance shall count toward the page limitations. We shall consider only those
12 requests for judicial notice of legislative history that strictly adhere to all of these requirements.
13 We impose these requirements so that: (1) the parties and amici focus only on the most important
14 elements of legislative history; (2) we are not deluged with a tsunami of requests for judicial notice
15 of legislative history documents that have only minimal relevance to our deliberations; and (3) we
16 and the parties are assured of having ready access to the legislative history documents. A failure
17 to comply with any one these requirements may result in the denial of the request for judicial
18 notice.

19 For the foregoing reasons,

20 **IT IS ORDERED** that defendant’s petition for reconsideration in *Almaraz v.*
21 *Environmental Recovery Services*, Case No. ADJ1078163 (BAK 0145426), filed on February 27,
22 2009, is **GRANTED**.

23 **IT IS FURTHER ORDERED** that reconsideration in *Guzman v. Milpitas Unified School*
24 *District*, Case No. ADJ3341185 (SJO 0254688), is **GRANTED** on the Appeals Board’s own
25 motion.

26 **IT IS FURTHER ORDERED** that the parties in *Guzman* shall have until 5pm on Friday,
27 May 1, 2009 to file and serve briefs on the merits, in accordance with the requirements set out

1 above.

2 **IT IS FURTHER ORDERED** that any interested person or entity shall have until 5pm on
3 Friday, May 1, 2009 to file and serve an amicus curiae brief, in accordance with the requirements
4 set out above.

5 **IT IS FURTHER ORDERED** that, after the period for the filing of amicus curiae briefs
6 has elapsed, each counsel for the parties in *Almaraz* and *Guzman* shall have until 5pm on
7 Thursday, May 21, 2009 to file and serve a single consolidated reply brief in response to the
8 amicus curiae briefs, in accordance with the requirements set out above.

9 **IT IS FURTHER ORDERED** that pending the issuance of a further joint Decision After
10 Reconsideration (En Banc) in *Almaraz* and *Guzman*, all further correspondence, objections,
11 motions, requests and communications shall be filed only with the Workers' Compensation
12 Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA
13 94102) or its Post Office Box address (P. O. Box 429459, San Francisco, California 94142-9459)

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1 and shall not be filed with any district office of the WCAB.

2 **WORKERS' COMPENSATION APPEALS BOARD**

3 /s/ Joseph M. Miller

4 **JOSEPH M. MILLER, Chairman**

5 /s/ James C. Cuneo

6 **JAMES C. CUNEO, Commissioner**

7 /s/ Frank M. Brass

8 **FRANK M. BRASS, Commissioner**

9 /s/ Ronnie G. Caplane

10 **RONNIE G. CAPLANE, Commissioner**

11 /s/ Alfonso J. Moresi

12 **ALFONSO J. MORESI, Commissioner**

13 /s/ Deidra E. Lowe

14 **DEIDRA E. LOWE, Commissioner**

15 **I CONCUR IN THE RESULT**

16 **(See attached Concurring Opinion)**

17 /s/ Gregory G. Aghazarian

18 **GREGORY G. AGHAZARIAN, Commissioner**

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

20 **4/6/2009**

21 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
22 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

23 **Mario Almaraz**

24 **The Law Offices of William Wolff, 940 East Main Street, Santa Maria, CA 93454**

25 **State Compensation Insurance Fund-Legal Division, 1275 Market Street, Third Floor, San**
26 **Francisco, CA 94103-1410**

27 **Joyce Guzman**

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**CONCURRING OPINION OF
COMMISSIONER AGHAZARIAN**

I concur with the decision to grant reconsideration in both the *Almaraz* and *Guzman* cases and to allow supplemental briefing, including the solicitation of amicus curiae briefs. However, I would go further and, in accordance with the Appeals Board’s broad powers on reconsideration (see Lab. Code, § 133), I would stay the legal effect – including the binding precedential effect (see Cal. Code Regs., tit. 8, § 10341) – of our February 3, 2009 joint en banc decision, pending the issuance of our further joint en banc opinion.

We cannot now determine, with certainty, whether or not we will affirm, rescind, alter, or amend our February 3, 2009 decision. Therefore, I believe it would be best to place the parties to these cases – as well as parties in other cases that otherwise would be bound by our February 3, 2009 decision – back in the position they would have been before that decision. In my view, by failing to stay the legal effect of our February 3, 2009 decision, there could be a substantial adverse impact on the workers’ compensation system, if our further decision should happen to arrive at a different result than our February 3, 2009 decision. This is because, in the interim, medical-legal and other costs might be unnecessarily accrued, incurred or wasted. This would be inconsistent with SB 899, which was intended to reduce the costs of the workers’ compensation system. (See, e.g., *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 565, 578] (SB 899 was adopted as “an urgency measure designed to alleviate a perceived crisis in skyrocketing workers’ compensation costs”).) Also, proceedings at the trial level might take place unnecessarily or have to be repeated, thereby possibly delaying the provision of permanent disability benefits. This would be inconsistent with the mandate of Article XIV, section 4, of the California Constitution to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character.”

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Accordingly, until we issue our further decision, I would stay our February 3, 2009 decision.

/s/ Gregory G. Aghazarian
GREGORY G. AGHAZARIAN, Commissioner

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
4/6/2009**

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