

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

JOSE RIVERA SILVA, *Applicant*

vs.

**INTERCON SECURITY SYSTEMS, INC., insured by HARTFORD FIRE AND
CASUALTY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,
*Defendants***

**Adjudication Number: ADJ17366311
Oakland District Office**

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

Applicant filed a Petition for Reconsideration of the Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on October 27, 2023. By the F&O, the WCJ found that defendant's Qualified Medical Evaluator (QME) Panel #7578289 was the correct panel in this matter and ordered a medical-legal evaluation to take place pursuant to this panel.

Applicant contends that defendant improperly served applicant's attorney with the panel via fax, rather than by mail, as required by AD Rule 30(b)(1)(C) (Cal. Code Regs., tit. 8, § 30(b)(1)(C)) and that, as a result, Panel #7578289 is invalid.

We received an Answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be denied.

We have considered the allegations of applicant's Petition for Reconsideration, the Answer, and the contents of the WCJ's Report with respect thereto. For the reasons discussed below, we will grant the petition for reconsideration. As our Decision After Reconsideration, we will affirm the F&O, except that we will amend it to find that Panel #7578289 is invalid and rescind the WCJ's order that the initial medical-legal evaluation take place pursuant to this panel.

BACKGROUND

On April 3, 2023, defendant issued an objection to the report of applicant's primary treating physician dated March 14, 2023. (Exh. A.) The objection was served upon applicant's attorney via fax. (Exh. B.) No response was received from applicant's attorney. On April 20, 2023, defendant requested a three-member panel of qualified medical evaluators in the specialty of orthopedics, resulting in the DWC Medical Unit issuing Panel #7578289. (Exh. 101.) Pursuant to the proof of service dated April 20, 2023, defendant served the QME panel upon applicant's attorney via fax. (Exhs. C, D.) Defendant then issued a panel strike, also via fax, on April 26, 2023. (Exh. 102.)

During a hearing on August 17, 2023, the parties set the validity of defendant's orthopedic QME panel as an issue for trial. (Minutes of Hearing (MOH), August 17, 2023, p. 1.) According to the MOH, this issue included not only applicant's claim that defendant only served the QME panel by fax, rather than by mail, but also that applicant was seeking a chiropractic QME panel. (MOH, August 17, 2023, p. 2.)

On October 27, 2023, the WCJ issued the F&O, finding that defendant's orthopedic QME panel was the correct panel and ordering that the medical-legal evaluation take place pursuant to that panel. On November 8, 2023, applicant filed a petition seeking reconsideration of the F&O, disputing the validity of defendant's QME panel based upon defective service.

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd. (Maranian)* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases

1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's decision includes findings regarding employment and injury AOE/COE. These are threshold issues fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the WCJ's decision contains findings that are final, applicant only challenges the WCJ's finding of fact that Panel #7578289 is the correct panel and the WCJ's order that the medical-legal evaluation take place pursuant to that panel. This is an interlocutory decision regarding discovery. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, we are persuaded that significant prejudice or irreparable harm will result if removal is denied.

Applicant asserts that Panel #7578289 is invalid because it was not properly served upon applicant's attorney in accordance with AD Rule 30(b)(1)(C) (Cal. Code Regs., tit. 8, § 30(b)(1)(C)). AD Rule 30 provides as follows in relevant part that when a represented party requests a QME panel:

(b) ...requests for an initial QME panel in a represented case, for all cases with a date of injury on or after January 1, 2005, shall be submitted electronically utilizing the Division of Workers' Compensation internet site....

(1) The party requesting a QME panel online shall:

* * *

(C) Print and serve a paper copy of the online request, the panel list, and a copy of any supporting documentation that was submitted online, upon the opposing party with a proof of service, within 1 (one) working day after generating the QME panel list. Within 10 (ten) days of service of the panel, each party may strike one name from the panel.

(Cal. Code Regs., tit. 8, § 30(b)(1)(C).)

In this case, the proof of service shows that defendant served applicant's attorney with the QME panel list via fax and email. However, by providing only the panel list, defendant failed to serve applicant's attorney with the remaining documents required by AD Rule 30(b)(1)(C), namely, a paper copy of the online panel request and any supporting documentation.

In circumstances such as this, where a party has failed to comply with the required rules of service for panel QME requests *and* omitted required documents, we conclude that the procurement of Panel #7578289 was not proper and is therefore invalid, and that, absent removal, applicant will suffer substantial prejudice and irreparable harm. Thus, reconsideration is hereby granted and we find that Panel #7578289 is invalidated for failure to comply with Rule 30(b)(1)(C). We will otherwise affirm the findings of fact determined by the WCJ.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the October 27, 2023 F&O is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 27, 2023 F&O is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Jose Rivera Silva, while employed on January 26, 2023, as a security guard, at Pasadena, California, by Intercon Security Systems, sustained injury arising out of and in the course of employment to head trauma, left shoulder,

and neck; and claims to have sustained injury arising out of and in the course of employment to the eye, right shoulder, and psyche.

2. At the time of injury, the employer was insured by Hartford Fire and Casualty, administered by Sedgwick Claims Management Services.
3. At the time of injury, the employee's earnings were \$977.03, warranting indemnity rates of \$651.35 for temporary disability, and pursuant to the statutory limits for permanent disability.
4. The carrier has paid temporary disability at \$651.35 per week from February 8, 2023, through April 13, 2023.
5. QME Panel #7578289 was not properly procured and is not valid.

ORDER

IT IS ORDERED that QME Panel #7578289 is stricken.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 8, 2024

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

**JOSE RIVERA SILVA
PACIFIC WORKERS
BRADFORD & BARTHEL**

AH/cs

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

CS