

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

MARIA ERICKA CASTILLO, *Applicant*

vs.

CANO HEALTH, LLC; THE HARTFORD, *Defendants*

**Adjudication Number: ADJ18073365
Santa Ana District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 9, 2023, wherein the WCJ found in pertinent part that defendant properly served a Panel Qualified Medical Evaluator (PQME) panel list and associated documents on applicant's counsel on September 6, 2023, per Cal. Code Regs., tit. 8, § 30(b)(1)(C) (Administrative Director (AD) Rule 30(b)(1)(C)), and that no good cause is found requiring issuance of a replacement panel.

Applicant contends that the WCJ erred in determining that defendant timely served PQME panel list and associated documents.

We received an answer from defendant.

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

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons provided below, we will grant applicant's Petition, rescind the F&O, and return the matter to the trial level.

BACKGROUND

We will briefly review the relevant facts.

Applicant filed an application for adjudication August 10, 2023, claiming injury to various body parts while employed by defendant as a referral coordinator, during the period from August 7, 2022 to August 7, 2023.

On September 6, 2023, defendant submitted a request for an initial QME panel.

On October 19, 2023, applicant filed a declaration of readiness (DOR) to proceed to an expedited hearing. The disputed issue was identified as:

AA objects to DA panel # 7617599 & seeks to invalidate panel DA obtained on 9/06/2023, DA had no supporting documents attached to panel. The stamp on the envelope shows it was not mailed until 9/08/2023. In violation of the 1 day rule to serve CCR Title 8 Section 30(c) & per case law Lopez v. Rockstar Staffing, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 199. Parties did meet & confer on 10/9/23 but were unable to resolve issue WCAB intervention required.

(Applicant's declaration of readiness, dated October 19, 2023, p. 7 [original in all-caps].)

On November 6, 2023, the matter proceeded to trial, on the following issues:

1. Whether Panel #7617599 is valid and properly obtained on 9-6-2023 by defendants.
2. Whether defendants properly served Panel #7617599 on 9-6-2023 within one day per Proof of Service, dated 9-6-2023.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), November 6, 2023 trial, p. 2.)

No testimony was offered at trial. (MOH/SOE, p. 3.) The WCJ admitted the following exhibits into evidence:

- Exhibit 1: Stamped envelope from defendant, dated 9-8-2023.
- Exhibit 2: M's objection to Panel #7617599, dated 9-13-2023.
- Exhibit A: Panel #7617599, issued on 9-6-2023.
- Exhibit B: E-mail by Marissa Torres, dated 9-6-2023.
- Exhibit C: DA's strike letter, dated 9-7-2023.
- Exhibit D: DA's E-mail to Applicant's counsel, dated 9-22-2023.
- Exhibit E: Hartford Notice of Denial of Claim, dated 10-10-2023.

(MOH/SOE, pp. 2-3.)

On November 9, 2023, the WCJ issued the following findings:

1. MARIA ERICKA CASTILLO born [] while employed during the period 08-07-2022 through 08-07-2023 as a referral service coordinator at Los Angeles, California, by CANO HEALTH LLC, whose workers' compensation insurance carrier was HARTFORD SACRAMENTO, claims to have sustained injury arising out of and occurring in the course of employment to her hands, neck, back, head, and shoulders.
2. Defendant properly served the PQME panel list and associated documents on applicant's counsel on September 6, 2023, per 8 CCR 30(b)(1)(C).
3. No good cause is found requiring of a replacement panel to issue.

ORDER

IT IS ORDERED that the matter is taken off-calendar.

(F&O, pp. 1-2.)

DISCUSSION

A petition for reconsideration may only be taken 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” or determines a “threshold” issue that is fundamental to the claim for benefits. (*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]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, the following: injury 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 1075 (“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ “); *Rymer, supra*, at 1180 (“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”); *Kramer, supra*, at 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.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ’s determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ’s decision includes findings on a threshold issue, i.e., the determination that applicant was employed by defendant during the period from August 7, 2022 to August 7, 2023 is a final order regarding a threshold issue. (F&O, Finding No. 1.) Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal. While this is a threshold issue, it was not challenged on reconsideration and we will not disturb the WCJ’s findings.

Turning to the Petition, applicant contends that the WCJ erred in determining that defendant timely served PQME panel list and associated documents. Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, 10955(a); *Cortez, supra*; *Kleemann, supra*.) Additionally, 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).)

Section 5313 provides:

The appeals board or the workers’ compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

(Lab. Code, § 5313.)

Section 5815 provides:

Every order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised.

(Lab. Code, § 5815.)

Taken together, sections 5313 and 5815 require the WCJ to “make and file findings upon all facts involved in the controversy” and to issue a corresponding award, order or decision that states the “reasons or grounds upon which the [court’s] determination was made.” (Lab. Code, §§ 5313, 5815; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).)

Here, the WCJ has not addressed applicant’s assertion that the QME panel request that was served on applicant’s counsel did not include the supporting documentation required by AD Rule 30(b)(1)(A)-(B), as required by AD Rule 30(b)(1)(C). Nor did the WCJ address the fact that defendant’s correspondence striking Richard Rogachefsky, M.D. from the QME panel (strike letter) is dated September 7, 2023, and the proof of service of the letter is dated September 7, 2023 (Exhibit C), but the envelope received by applicant’s attorney bears a postage stamp dated September 8, 2023. (Exhibit 1.)

The presumption that a letter mailed was received is rebuttable. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817; citing *People v. Smith* (2004) 32 Cal. 4th 792, 799.) If the sending party produces evidence that a document was mailed, the burden shifts to the recipient to produce “believable contrary evidence” that it was not received. (*Suon, supra*, at 1817; *Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421-422, citing *Slater v. Kehoe* (1974) 38 Cal. App. 3d 819, 832, fn. 12.) However, once the intended recipient produces sufficient evidence showing non-receipt of the mailed item, “the presumption disappears” and the “trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.” (*Id.*)

AD Rule 30(b)(1)(C) requires that the party requesting a QME panel online shall:

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.

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

Here, a “declaration of service” form accompanied defendant’s QME panel request, but it is not signed under penalty of perjury, nor is there a declaration that it was signed under the laws of the State of California, as such it is unclear whether the “declaration of service” constitutes a “proof of service.” If defendant produced a proof of service that the QME panel request, including the required attachments, was mailed on September 6, 2023, it was not admitted into evidence.¹

The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].) Although the parties were present at trial, the WCJ did not elicit testimony in an effort to develop the record or clarify the issues raised in applicant’s petition.

Based on the limited evidentiary record, we are unable to evaluate the basis of the WCJ’s Order. Moreover, the WCJ did not make and file findings on all of the issues framed at trial. Therefore, we must return this matter to the trial level for further proceedings.

Accordingly, we grant applicant’s petition, rescind the November 9, 2023 F&O, and return the matter to the WCJ for further proceedings consistent with this decision.

¹ The Appeals Board’s record of proceedings is maintained in the adjudication file and includes: the pleadings, minutes of hearing, summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits identified but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator’s file, if any. “Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings.” (Cal. Code Regs., tit. 8, § 10803.)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on November 9, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on November 9, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 12, 2024

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

**MARIA ERICKA CASTILLO
LAW OFFICES OF ALEXANDER SOLHI & ASSOCIATES
LAW OFFICES OF LAKEESHA T. JEMERSON**

JB/cs

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

CS