

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

JOSE BARBA, *Applicant*

vs.

**LA VENADITA MEAT MARKET, INC.; AMGUARD INSURANCE COMPANY,
adjusted by BERKSHIRE HATHAWAY HOMESTATE COMPANIES/GUARD
INSURANCE COMPANIES, *Defendants***

**Adjudication Number: ADJ14819466
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

We have considered the allegations of applicant's Petition for Removal or in the alternative Reconsideration, defendant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the Findings and Award (F&A).

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) 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].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision 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 a finding regarding injury AOE/COE. This is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, applicant is only challenging an interlocutory finding/order in the decision regarding whether defendant made a timely strike from the qualified medical evaluator (QME) panel. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

We adopt and incorporate the following from the WCJ's Report:

FACTS

The Applicant was employed for Defendant La Venadita Meat Market Inc. on May 22, 2021 when he sustained an admitted industrial injury to his right index finger. A QME panel was requested by Applicant's attorney on September 20, 2021. The panel was issued on September 21, 2021 and served on Defendant by Applicant's counsel on September 21, 2021. Applicant struck Russell Ellis on September 28, 2021. Defendant struck Joel Bird on October 4, 2021. The remaining QME on the list was Emily Holbrook. The matter proceeded to an Expedited Hearing on November 29, 2021. The issue before this court was whether the Defendant's panel strike was timely.

On December 17, 2021 this court issued its Findings of Fact in which it was found that Defendant's October 4, 2021 panel strike was timely. It is from this finding that Applicant seeks reconsideration or in the alternative removal.

...

DISCUSSION

Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge *Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596, 600 fn 5, [71 Cal. Comp. Cases 155, 157, fn 5]; *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274, 281, fn 2 [70 Cal. Comp. Cases 133, 136, fn 2]. Pursuant to California Code of Regulations 10955 the petitioning party must demonstrate that significant prejudice or irreparable harm will result if removal is not granted and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

...

Applicant's main argument is that a party's time to strike pursuant to Labor Code 4062.2(c) is triggered by assignment of the panel and not service pursuant to

California Code of Regulations 30(b)(1)(C). In relevant part Labor Code 4062.2(c) states within 10 days of assignment of the panel by the administrative director, each party may strike one name from the panel. The remaining qualified medical evaluator shall serve as the medical evaluator. If a party fails to exercise the right to strike a name from the panel within 10 days of assignment of the panel by the administrative director, the other party may select any physician who remains on the panel to serve as the medical evaluator. In relevant part, California Code of Regulations 30(b)(1)(C) states 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. Within 10 (ten) days of service of the panel, each party may strike one name from the panel.

Applicant cites to *Alvarado v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1142 (writ den.) to support their contention that the operative trigger of the time period in which to act under Labor Code 4062.2(c) is the assignment of the panel. In *Alvarado* the court found that California Code of Civil Procedure 1013 did not operate to extend the time in which an applicant could strike a physician from the panel because the time to act was triggered by assignment of the panel and not service.

However, in *Razo v. Las Posas Country Club*, 2014 Cal. Wrk. Comp. P.O. LEXIS 12 the board found *Alvarado* to be distinguishable because it involved application of former section 4062.2, which allowed the parties 10 days to agree on one of the QMEs in the assigned panel, and which gave the parties a right to strike a name from the panel within three working days of gaining the right to do so. However, amended section 4062.2(c) no longer includes language affording a party the right to agree to a panel QME or to strike a name within three working days. Instead, the statute now provides that each party has 10 days from assignment of the panel. This court finds the analysis in *Razo* to be persuasive and believes the ten days provided under 4062.2(c) should be construed to include an additional five calendar days for service of the assignment in accordance with Cal. Code of Regulations Section 10605(a)(1).

Pursuant to California Code of Regulations 30(b), effective October 1, 2015, requests for an initial QME panel for all represented cases with a date of injury on or after Jan. 1, 2005, are to be submitted electronically. In practice, after the request is submitted the panel list is generated automatically and made available to the requesting party. The requesting party is then required to serve the panel list on opposing counsel. This requirement that the requesting party serve the panel list on opposing counsel was not the procedure in place at the time *Alvarado* was decided. As a practical matter, mere "assignment" of the panel does not provide the parties with notice of the names and the related right to strike or forgo striking a name. In essence, a party's right to strike a name would be meaningless unless the identity of the panel QMEs is communicated to them.

Based on the current procedure, the names of the panel QMEs is provided to opposing counsel through service of the panel list by the party who made the request. Since the non-requesting party would not be aware of the names on the panel list until the list is served, service is the action that triggers a non-requesting party's right to strike. In the case at hand, Defendant made their strike thirteen days from the date the panel was served by Applicant. Based on Labor Code 4062.2(c) which allows ten days for a party to make their panel strike, and Cal. Code of Regulations Section 10605(a)(1) which provides for an additional five days from the date of service to the party who was served in California by mail, fax, email, or any method other than personal service, Defendant's strike was timely.

(Report, January 21, 2022, pp. 2-5.)

Additionally, section 4062.2(c) details the striking process and specifically provides that "The administrative director may prescribe the form, the manner, or both, by which the parties shall conduct the selection process." (Lab. Code, § 4062.2(c); see also Lab. Code, § 5307.3.) Requiring the requesting party to serve the panel on the other party is within the AD's authority to prescribe the manner in which the parties conduct the QME selection process. As discussed by the WCJ in his Report, the non-requesting party's right to strike is meaningless until they have been served with the panel and know the identity of the physicians. Since WCAB Rule 10605 provides additional time to exercise a right when a document is served by mail (or any method other than personal service), the non-requesting party is entitled to additional time to make its strike per the mailbox extension.

Therefore, we will affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on December 17, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 6, 2022

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

**GARRETT LAW GROUP
HANNA BROPHY
JOSE BARBA**

AI/pc

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