

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

ROGELIO TRIGUEROS, *Applicant*

vs.

**GONZALEZ AG, INC.; STAR INSURANCE COMPANY, administered by
MEADOWBROOK INSURANCE, *Defendants***

**Adjudication Number: ADJ13190781
Bakersfield District Office**

OPINION AND DECISION AFTER REMAND

The following Decision after Remand is issued pursuant to the unpublished Opinion issued on March 30, 2022 (Opinion) by the Fifth Appellate District Court of Appeals (Court), in which the Court granted the relief requested by the Workers' Compensation Appeals Board (WCAB) to remand the matter to the WCAB. (Opinion, p. 4.) The Court vacated the WCAB's August 4, 2021 Opinion and Decision after Reconsideration (Decision),¹ and remanded the matter to the WCAB for further proceedings consistent with the Opinion. (*Ibid.*)

Applicant contended on review that the WCAB erred in granting reconsideration of the Findings of Fact issued by a workers' compensation administrative law judge (WCJ) on December 28, 2020² because it misapplied WCAB Rule 10650 (Cal. Code Regs., tit. 8, § 10650) when

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

² We note that defendant sought removal of the Findings, even though the Findings contained 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. The Findings included a finding of fact on a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Defendant, however, only sought review of an interlocutory decision regarding discovery, and therefore, the WCAB evaluates the matter under the removal standard. (See Cal. Code Regs., tit. 8, § 10955(a); see *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; and *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].)

calculating the time to request a three-member panel of qualified medical evaluators under Labor Code³ section 4062.2, subdivision (b).

The Court agreed and granted review because the Appeals Board misapplied WCAB Rule 10605 (Cal. Code Regs., tit. 8, § 10605) when calculating how many days after the “required minimum ‘10 days after the date of mailing of a request for a medical evaluation’ before a party may request the assignment of a three-member panel of qualified medical evaluators under labor Code section 4062.2, subdivision (b).” (Order, March 3, 2022, p. 1.) The Court pointed out that pursuant to the Appeals Board “en banc decision in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (*Messele*) and Labor Code section 5316, the WCAB’s own rules govern service of process and any applicable extensions of time to act where they differ from the more generally applicable provisions under Code of Civil Procedure section 1013.” (*Ibid.*)

After further review of the record and legal issue raised by the Court, the WCAB concurred with the Court “that the WCAB should have added only five days to the statutory 10-day waiting period, for a total of 15 days, before considering the first day a party may validly request a panel of qualified medical evaluators.” (Order, p. 2.) As stated in the Appeals Board Opinion and Decision after Reconsideration (Decision):

[Labor Code] section 4062.2, subdivision (6), requires the requesting party to wait until “the first working day that is at least 10 days after the date of **mailing** of a request for a medical evaluation” before requesting a QME panel. Since mailing the request for an evaluation is the operative act to request a panel, the requesting party must wait ten days after the date of mailing of a request for an evaluation per section 4062.2(6) *plus the applicable additional time for mailing* per current WCAB Rule 10605 before they may exercise the right to request a panel. (Writ, Exh. 7, p. 38, emphasis in the original.)

WCAB Rule 10605 extends the time to exercise or perform “any right or duty to act or respond” by:

(1) five calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record **being served** is within California...,” and

³ All further references are to the Labor Code unless otherwise noted.

(2) Ten calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record **being served** is outside of California but within the United States...

(b) For purposes of this rule, place of address and the place of mailing” [sic] means the street address or Post Office Box of the party, attorney or other agent of record **being served**, as reflected in the Official Address Record at the time of service... (Cal. Code Regs., tit. 8, § 10605 (a)(1)-(2), emphasis added.)

In contrast, Code of Civil Procedure section 1013 states:

Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, **if the place of address and the place of mailing is within the State of California**, 10 calendar days **if either the place of mailing or the place of address is outside the State of California** but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States... (Code Civ. Proc., § 1013, emphasis added.)

Thus, unlike Code of Civil Procedure section 1013, WCAB Rule 10605 states that the calculation of any time extending the time for a party to exercise or perform “any right or duty to act or respond” depends entirely on the place of mailing *of those being served* and is not dependent on the place of the mailing itself.

As the WCAB set forth in the challenged opinion, as well as its prior en banc decision in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (*Messele*) and as established under section 5316, the WCAB’s own rules govern service of process and any applicable extensions of time to act where they differ from the more generally applicable provisions under CCP § 1013.

...

WCAB Rule 10605, subdivision (b) expressly defines “place of address and the place of mailing” is a single defined reference to the location of the person being served; the location where any triggering mailing originates from is thus irrelevant. (See also former Cal. Code Regs., tit. 8, § 10507 similarly dependent only on “the physical address of the party ... being served.”) (Opinion, pp. 3-4.)

Here, the triggering event for calculation of the time under section 4062.2, subdivision (b), for the “date of mailing of a request for a medical evaluation” before a party may request the assignment of a three-member panel of qualified medical evaluators, was defendant’s May 4, 2020

Notice Regarding Delay of Workers' Compensation Benefit (delay notice).⁴ (See *Chavarria v. Crews of California, Inc.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 534.) Given that the delay notice was served only on parties in California,⁵ the extension of time pursuant to WCAB Rule 10605 for any party to have requested the assignment of a QME panel based on the mailing of the delay notice, was 5 days. The WCJ in this matter concluded that applicant's panel request was not premature because he waited 16 days from the date of mailing of defendant's claim delay notice before submitting his request, i.e., he waited the requisite 15 days (10 days pursuant to section 4062.2, subdivision (b), plus 5 for mail service). We concur that applicant's QME panel (panel number 7336281) was timely requested and valid.

Accordingly, it is our decision after remand to affirm the Findings issued by the WCJ in this matter.

⁴ The delay notice was admitted into evidence as Joint Exhibit 5 at the October 22, 2020 trial in this matter.

⁵ The delay notice was sent to: Rogelio Trigueros, c/o Gonzalez Ag, Inc., 823 Brittany Street, Shafter, CA 93263, and copied to the employer and counsel for both defendant and applicant: Gonzalez Ag, Inc., 823 Brittany Street, Shafter CA 93263; Sef Krell, Esq., 5115 Louise Ave, Encino, CA 91316; Adrianna Maldonado, sent via E-mail. We note that pursuant to the Chiro QME Panel Issued, Adrianna Maldonado of Gilson Daub, is defendant's attorney, and is located in San Juan Capistrano, California. (Delay notice, Joint Exh. 5, p. 1.)

For the foregoing reasons,

IT IS ORDERED as the Decision after Remand of the Workers' Compensation Appeals Board that the Findings of Fact issued by a workers' compensation administrative law judge on December 28, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2022

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

**LAW OFFICES OF GILSON DAUB
LAW OFFICES OF SEF KRELL
ROGELIO TRIGUEROS**

AJF/abs

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