

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

EMILIO VALENCIA, *Applicant*

vs.

**BLUE WATER ENVIRONMENTAL SERVICES;
ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11073230
Stockton 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.

Applicant seeks removal of the Findings and Award (F&A) issued by the arbitrator on January 22, 2020. By the F&A, the arbitrator found that the utilization review (UR) decision of November 15, 2019 was timely made and communicated.

Applicant contends that the UR decision was not timely communicated and he is entitled to the surgery and all other treatment requested by his primary treating physician (PTP).

We received an answer from defendant. The arbitrator submitted a Report and Recommendation on Petition for Removal (Report) recommending that we deny the Petition.

We have considered the allegations of applicant's Petition for Removal, defendant's answer and the contents of the arbitrator's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the arbitrator for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to his low back on September 25, 2017 while employed as an asbestos removal worker by Bluewater Industries. Applicant's claim is subject to and being arbitrated through the Basic Crafts Alternative Dispute Resolution Workers' Compensation

Program (hereinafter “ADR Program”) pursuant to Labor Code¹ section 3201.5. (Lab. Code, § 3201.5.)²

According to the arbitrator’s Report and the parties’ pleadings, a hearing with the arbitrator was conducted telephonically on January 16, 2020 regarding in relevant part whether defendant’s November 15, 2019 UR decision non-certifying lumbar spine surgery was timely communicated to the parties. There does not appear to be a transcript from this hearing outlining the parties’ stipulations, the issues to be adjudicated or the evidence admitted into the record regarding the dispute.

By the F&A, the arbitrator found that applicant was entitled to temporary disability from November 12, 2019 and that the November 15, 2019 UR decision was timely made and communicated to the required parties. Applicant has only challenged the arbitrator’s finding regarding the UR decision.

DISCUSSION

I.

Preliminarily, the arbitrator in his Report asserts that applicant’s Petition was untimely because it was not served directly on the Appeals Board.³ It is acknowledged that the proof of service attached to applicant’s Petition does not indicate service on the Appeals Board. However, applicant’s Petition was date stamped as received by the Appeals Board on February 13, 2020, which is within 25 days of the F&A. (See Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020); see also Cal. Code Regs., tit. 8, former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020) [a document is deemed filed on the date it is received].)⁴ Additionally, a document that is subject to a jurisdictional time limit shall not be rejected for filing solely on the basis that it was not filed in the proper office of the Appeals Board. (Cal. Code Regs., tit. 8, former § 10397(a)(1), now § 10617(a)(1) (eff. Jan. 1, 2020).)

¹ All further statutory references are to the Labor Code unless otherwise stated.

² Section 3201.5 permits employers in specific industries to establish an alternative dispute resolution system. (Lab. Code, § 3201.5(a).)

³ The arbitrator cites to WCAB Rule 10865 regarding service of petitions challenging arbitrator’s decisions. It is noted that WCAB Rule 10865 was revised to be WCAB Rule 10990 effective January 1, 2020. (Cal. Code Regs., tit. 8, former § 10865, now § 10990 (eff. Jan. 1, 2020).)

⁴ Applicant is reminded that a proof of service should identify all parties who were served. (See Cal. Code Regs., tit. 8, former § 10505, now § 10625(c) (eff. Jan. 1, 2020).)

The record reflects that applicant's Petition was timely received by the Appeals Board and we therefore consider it to be timely filed.

II.

As with decisions by a WCJ, decisions by an arbitrator “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc); see also *Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original [meaningful review of an arbitrator's decision requires that the “decision be based on an ascertainable and adequate record,” including “*what evidence is admitted or denied admission*”].) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.)

Although the parties engaged in a telephonic conference on January 16, 2020, there is no record of that conference including the stipulations, issues to be determined and evidence admitted into the record. We are unable to address applicant's challenge to the arbitrator's decision in the absence of a record.

It is further acknowledged that applicant sought removal of the F&A. In general, only a final order, decision or award in an ADR Program may be reviewed by the Appeals Board in the same manner as a petition for reconsideration. (See Lab. Code, § 3201.5(a)(1).) However, the arbitrator in his Report states that Rule 1503 of the ADR Program permits a petition for removal to be filed by a party.⁵

Upon return of this matter to the trial level, we recommend the arbitrator create a complete evidentiary record regarding this dispute and issue a new decision. Either party may then challenge

⁵ In a non-ADR workers' compensation case, determination of the timeliness of a UR decision may be a final decision subject to reconsideration since it determines which entity has jurisdiction to address medical necessity of the disputed treatment: independent medical review (IMR) per section 4610.5 or the Appeals Board. (See e.g., *Allied Signal Aerospace v. Workers' Comp. Appeals Bd. (Wiggs)* (2019) 35 Cal.App.5th 1077, 1084-1085 [84 Cal.Comp.Cases 367] [the Court of Appeal held that the issue of whether the UR process or the Appeals Board has jurisdiction over a home health care dispute is a final order].) However, the arbitrator's opinion on decision for the F&A states that the ADR Program does not have independent medical review (IMR). If there are further pleadings in this matter before the Appeals Board, it is respectfully requested that the petitioning party clearly delineate the basis for jurisdiction by the Appeals Board to address the challenged decision.

that decision to the extent permitted by the Labor Code and the provisions of the ADR Program. We make no comment on the disputed issue between the parties and will defer determination of the dispute to the arbitrator in the first instance.

Therefore, we will rescind the F&A and return this matter to the ADR Program for further proceedings consistent with this opinion.

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 arbitrator on January 22, 2020 is **RESCINDED** and the matter is **RETURNED** to the ADR Program for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 22, 2021

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

**EMILIO VALENCIA
LAW OFFICES OF NADEEM MAKADA
WITKOP LAW GROUP**

AI/pc

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