

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

REINA MORALES, *Applicant*

vs.

**RALPH LAUREN CORPORATION and SAFETY NATIONAL
CASUALTY CORPORATION, administered by CORVEL
CORPORATION, *Defendants***

Adjudication Numbers: ADJ11973646, ADJ11973645, ADJ11973644

Stockton District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 25, 2022, wherein the WCJ found in pertinent part that applicant, while employed by defendant as a retail clerk, claimed injury arising out of and occurring in the course of employment, to her back/spine, nervous system, and cardiovascular system; that defendant did not receive the Internal Medicine Qualified Medical Examiner Panel #7411683, served by applicant's counsel; and that defendant's strike of Massoud Mahmoudi, D.O., from Panel #7411683 was timely.

Applicant contends that the QME panel was timely served and defendant did not rebut the presumption that it was timely received, so defendant's strike of Dr. Mahmoudi was not timely.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind

the F&O and substitute our Opinion and Decision After Reconsideration, including the caption above, to accurately identify the parties.¹

BACKGROUND

Applicant claimed injury to her back, psyche, and circulatory system, while employed by defendant as a retail clerk on November 4, 2017 (ADJ11973646). She also claimed injury to her back, psyche, and circulatory system, while employed by defendant during the period from September 3, 2017, through September 3, 2018 (ADJ11973645); and to her back/spine, nervous system, and cardiovascular system, while employed by defendant during the period from September 2, 2017, through September 2, 2018 (ADJ11973644).

Applicant's attorney requested an internal medicine Qualified Medical Evaluator Panel and the Division of Workers' Compensation Medical Unit issued Panel #7411683 on May 13, 2021. (See App. Exh. 1.) On May 13, 2021, applicant's attorney's staff administrator (Marilyn Mora) served defendant's counsel the internal medicine Panel #7411683. (See App. Exh.1 p. 6 and App. Exh.3.) On May 28, 2021, staff from defense counsel's office left a voice mail message and sent an email to applicant's attorney (John Gonzalez Esq.) requesting that he "provide a copy the internal [medicine] panel as we have not received it to date." (Def. Exh. H, see also Def. Exh. G.) Another email was sent, requesting a copy of the internal medicine panel, on June 2, 2021. (Def. Exh. I.) By correspondence to defendant, dated June 4, 2021, applicant's attorney stated, "Pursuant to your 5/28/21 request, I have enclosed copies of the two panels that have issued." (Def. Exh. F.) On June 10, 2021, defense counsel responded to the letter from applicant's counsel, by correspondence stating:

Consistent with the provisions outlined in Labor Code §4062.2, Defendant hereby strikes Massoud Mahmoudi, D.O. from Panel and we will now be scheduling a Panel Qualified Medical Evaluation with the remaining doctor, Suresh Mahawar, M.D. An appointment letter will be sent out under separate cover.
(Def. Exh. J.)

¹ We note that the F&O and Report have what appear to be clerical errors, in that defendant is not correctly identified. By rescinding the F&O and substituting it with our Findings of Fact, we are not altering the outcome of the proceedings, we are simply correcting the F&O to properly identify the parties.

The parties proceeded to trial on January 20, 2022. The issue submitted for decision was, “Timely strike and service of the internal QME panel.” (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 20, 2022, p. 2.)

DISCUSSION

We first note that 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 injury arising out of and occurring in the course of employment, jurisdiction, and the existence of an employment relationship. (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 Appeals Board. (See Lab. Code, § 5904.)

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, although applicant’s Petition is in regard to an interlocutory discovery issue, the F&O resolves the threshold issue of the existence of an employment relationship. It is therefore appropriate that applicant seeks reconsideration, and we will address the issues raised in the Petition by utilizing the applicable removal standard.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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); 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, applicant requests that we find that “applicant’s counsel timely served the Panel QME list and that defendants [sic] failed to issue a timely strike.” (Petition, p. 2.) Having reviewed the trial record, for the reasons stated in the WCJ’s report, we agree with the WCJ that defendant’s strike of Massoud Mahmoudi, D.O., was timely. Also, we are not persuaded that substantial prejudice or irreparable harm will result by the relief sought by applicant being denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to applicant.

However, as noted above (see footnote 1) the F&O does not properly identify the defendants. A decision by a WCJ is a final decision of the Appeals Board unless reconsideration or removal is granted. (Cal. Code Regs., tit. 8, § 10330.) A certified copy of an Appeals Board order, decision, or award, may be filed with the clerk of the superior court and “Judgment shall be entered immediately by the clerk in conformity therewith.” (Lab. Code, § 5806.) Clearly, if the parties are not properly identified in the Appeals Board decision, the “judgment” is not enforceable.

As we stated earlier, it appears that the misidentification of the defendants in the F&O is a clerical error. The term “clerical error” includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. The Appeals Board may correct a clerical error at any time without the need for further hearings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145].) Thus, we will rescind the F&O and substitute our Opinion and Decision After Reconsideration. The only purpose of our rescinding the F&O is to correct the clerical error, and it does not otherwise affect the WCJ’s decision and/or the outcome of these proceedings.

Accordingly, we rescind the F&O and substitute our Opinion and Decision After Reconsideration, including the caption above, to accurately identify the parties.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the February 25, 2022, Findings of Fact and Orders is **RESCINDED** and the Appeals Board Opinion and Decision After Reconsideration, including the following, is **SUBSTITUTED** therefor:

ISSUE FOR DETERMINATION

1. Timely strike and service of the internal QME panel.

FINDINGS OF FACT

1. That the Applicant who was 47 years old as of the date of injury, as a retail clerk, at Livermore, California, by Ralph Lauren, claims to have sustained injury arising out of and occurring in the course of employment to her nervous system, back, spine, cardiovascular.
2. At the time of the injury, the employer's workers' compensation carrier was Safety National Casualty Corp.
3. Defendant has demonstrated panel #7411683 was not received.
4. Defendant's strike of Dr. Mahmoudi from panel #7411683 was timely.

ORDER

- a) Defendant's strike of Dr. Mahmoudi from panel #7411683 was timely.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 22, 2022

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

**REINA MORALES
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
MANNING & KASS ELLROD, RAMIREZ, TRESTER LLP**

TLH/mc

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