

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

ERIKA FRACTIOUS, *Applicant*

vs.

MARRIOTT INTERNATIONAL, INC., *permissibly self-insured, Defendant*

**Adjudication Number: ADJ11629950
Los Angeles District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O) issued on July 14, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a claims examiner from October 26, 2015 to April 11, 2018, applicant did not sustain injury arising out of and in the course of employment to her psyche, upper extremities, and shoulders; (2) there was no bad faith denial of applicant's claim; (3) the denial of claim was timely; (4) there is no good cause to order an additional panel in psychiatry; and (5) the issues of the date of maximum medical improvement, permanent disability, apportionment, future medical care, liability for self-procured medical treatment, and attorney fees are moot.¹

The WCJ ordered that applicant take nothing on her claim.

Applicant contends that the WCJ erroneously failed to order an additional panel in psychiatry; and, in consequence, erroneously failed to find that applicant sustained injury to her psyche.

We received an Answer from defendant.

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

¹ The parties filed separate pleadings on the issue of whether the Petition should be deemed timely. Since WCAB Rule 10964(a) requires permission from the Appeals Board for filing supplemental pleadings only where "a petition for reconsideration has been timely filed" and the issue of timeliness is now before us, we do not view the separate pleadings as supplemental pleadings and we will consider the allegations therein. (See Cal. Code Regs., tit. 8, § 10964.) However, we will not consider either the contents or attachments to the separate pleadings as evidence because they have not been admitted in evidence.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, and as our Decision After Reconsideration, we will rescind the F&O and substitute findings that (1) applicant did not sustain injury to her upper extremities and shoulders; (2) defendant did not untimely deny applicant's claim; (3) defendant did not deny the claim in bad faith; and (4) defer the issues of whether good cause exists for an additional panel in psychiatry, whether applicant sustained injury to her psyche, and all other issues, as appropriate; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On October 24, 2018, applicant filed her application for adjudication, alleging injury to various body parts, including her "NERVOUS SYSTEM – Psychiatri[c]." (Application for Adjudication, October 24, 2018, p. 9.)

On January 25, 2023, the matter proceeded to trial as to the following issues:

1. AOE/COE, with the applicant claiming upper extremities, shoulders, and psyche.
2. Permanent and stationary date, with the employee claiming no MMI date and continuing treatment with Dr. Russman.
3. The employer/carrier claims for MMI dates August 13, 2018 pursuant to PQME Dr. Sirajullah.
4. Permanent disability.
5. Apportionment.
6. Future medical treatment.
7. Liability for self-procured medical treatment.
8. Attorney fees.
9. Defendant objects to the designation of Dr. Russman as the primary treating physician pursuant to Labor Code section 4600, as he does not have a designation letter or document for this for Dr. Russman. Applicant Attorney argues they do have the designation letter. Defendant argues that the designation letter was not filed or listed as an exhibit. The issue of Dr. Russman being identified as a primary treating physician remains open.
10. Labor Code section 3208.3 as to the psyche is raised by Defendant.

11. Applicant raises the issue of whether there is good cause for an additional panel in psyche.
12. Applicant issue is whether the denial was in bad faith and/or whether the denial was untimely pursuant to Labor Code section 5402. Applicant asserts there was a failure to investigate and an immediate denial of claim.
13. Defendant objects to any exhibits not served prior to or at the MSC and witnesses listed after the MSC in April 2022.
(Minutes of Hearing and Summary of Evidence, January 25, 2023, pp. 2:17-3:13.)

The WCJ admitted applicant's petition for a psychiatric panel dated May 15, 2019, and defendant's objection to the additional panel request dated May 31, 2019, into evidence. (*Id.*, pp. 4:15, 6:8.)

The F&O states:

Pursuant to title 8 Cal. Code of Regulations Sections 10610, 10625(b)(2) and 10628(d) service of this FINDINGS AND ORDER AND OPINION ON DECISION by the WCAB is by email on Defense Counsel Michael G. McConville (SBN 116437) mcconville@sbcglobal.net from Floyd, Skeren & Kelly who is ordered to serve this Order on all parties listed in the official address record and per Title 8 CCR 10629. By: Y. Pina Dated: 7/14/23

COURTESY COPY TO FOLLOW BY US MAIL ON ALL PARTIES
(F&O, p. 3.)

In the Opinion on Decision, the WCJ states:

It is noted that the PQME said applicant should be evaluated by a psyche. Yet for 5 years, she did not. Applicant argued that Dr. Sirujallah should review records. Yet there has been no attempt to send further records to the PQME, again a lack of due diligence for 5 years. Applicant has not treated since the one time evaluation with Dr. Russman on 1/7/19. If there was discovery to be had, it should have been had years ago, not now in 2023. The same argument goes for the request for a panel in psyche. If the applicant's attorney knew about this in 2018 according to the orthopedic PQME's recommendation, and even the treating doctor Russman did not mention it in January 2019, there was no treatment or request for additional panel, petition, DOR, once applicant's attorney filed their petition back on 5/15/2019. It is not the WCAB's job to rescue a case when there has been no action or discovery for years, a lack of due diligence or lack on applicant's part and/or applicant's treating doctor(s) (Russman or any of the other provides like the acupuncturist in March 2019) to request the referral. The psyche was not claimed, it was not mentioned by Dr. Russman, who came AFTER the 2018 PQME in orthopedics, and so I cannot and do not

find “good cause” to order additional discovery via an additional panel in psyche.
(Opinion on Decision, pp. 2-3.)

On July 18, 2023, the trial court served courtesy copies of the F&O upon the following parties:

ERIKA FRACTIOUS Injured Worker, 1850 S DIAMOND BAR BLVD APT 808
DIAMOND BAR CA 91765

FLOYD SKEREN PASADENA Law Firm, 3835R E THOUSAND OAKS BLVD
PMB 630 WESTLAKE VILLAGE CA 91362, pas-serve@fsklaw.com

MARRIOTT HOT SPRINGS Claims Administrator, PO BOX 14238
LEXINGTON KY 40512

TELLERIA TELLERIA SAN GABRIEL Law Firm, 828 W LAS TUNAS
DR SAN GABRIEL CA 91776
(Proof of Service of Courtesy Copy of Findings and Order, July 18, 2023.)

On September 6, 2023, defendant filed its proof of service of the F&O. It states that electronic service was effected on that same date upon the following parties:

Mr. Anthony F. Telleria Telleria, Telleria & Levy, LLP Applicant’s
Attorney – Served via Fax to (626) 564-1873 from (626) 395-7808

Ms. Erika Fractious Applicant – Served via Attorneys of Record: Telleria,
Telleria & Levy, LLP

Mr. Justin Romine Marriott Claims Services - MCS Claims Adjuster –
Served via Email
(Proof of Service of Findings and Order, September 6, 2023.)

On September 7, 2023, defendant filed its revised proof of service of the F&O. It states that service was effected on September 6, 2023 on the following parties in the manner specified:

Mr. Anthony F. Telleria Telleria, Telleria & Levy, LLP Applicant’s
Attorney – Served via Fax to (626) 564-1873 from (626) 395-7808

Ms. Erika Fractious 1850 S. Diamond Bar, Apt. 804 Diamond Bar, CA
91765 Applicant – Served via USPS and Attorneys of Record: Telleria,
Telleria & Levy, LLP

Mr. Justin Romine Marriott Claims Services - MCS Claims Adjuster –
Served via Email
(Proof of Service of Findings and Order, Revised, September 7, 2023.)

On October 20, 2023, applicant filed the Petition, alleging that the F&O was not served directly upon her. (Petition, p. 1:20-21.) A declaration asserting the timeliness of the Petition was filed along with the Petition. (Declaration Regarding Timely Filing, October 20, 2023.)

On October 30, 2023, defendant filed the Answer, alleging that on September 6, 2023, it served the F&O electronically upon applicant’s attorney and upon applicant by regular mail. (Answer, p. 2:9-11.) It further alleges that on September 19, 2023, the United States Postal Service returned as “Undeliverable” the envelope addressed to applicant that enclosed the F&O. (*Id.*, p. 2:12-14.) Defendant asserted that it filed a copy of the returned envelope along with the Answer. (*Id.*)

In the Report, the WCJ states:

The decision was served by the WCAB upon the parties on July 18, 2023. The Applicant filed the Petition for Reconsideration on October 20, 2023. Defendant responded to the Petition on October 30, 2023, also raising the issue of the untimely Petition, regardless of whether the decision was received in July, August or at the latest, September 6, 2023 when defense counsel served it. Even then, it was well beyond 25 days, and therefore the Petition is untimely.

...

The main issue is Applicant demanding a psychological panel QME as a second panel in the case.

...

The applicant's DWC-1 Claim Form did not list "psyche". Dr. Russman did not note any psyche complaints, despite the fact her exam was already over 6 months since applicant left her employment and was working at Benchmark. Dr. Russman diagnosed her with right shoulder pain and some vague muscle contracture.

...

PQME Dr. Sirujallah, in his 8/13/2018, 12/28/2018, and 12/11/2019 reports, found no injury or impairment. He did state that Applicant should be evaluated by a psyche. Yet for 5 years, she did not.

...

I found that the same lack of due diligence applied to the psyche aspect of the claim and Applicant's argument for a second panel in psyche. If the Applicant or Applicant's attorney knew about the psyche claim since 2018, according to the orthopedic PQME's recommendation, even when the Dr. Russman did not mention it in her one report of 1/7/19, there was still no treatment or request for additional panels after the petition in May 2019.

The matter could have proceeded to trial 2 years ago in 2021, but the parties went off calendar for further discovery. Even then, when the Applicant knew the medical evidence was lacking, the Applicant did not procure the further evidence and instead the case ended up set for trial on all issues later.

...

It also appeared that the 12/22/21 hearing went off calendar and was later placed back on calendar, and Applicant was supposed to return to Dr. Russman to seek psyche treatment or a referral, or anything to evidence that a psyche claim existed here. The Applicant had the opportunity to investigate and conduct discovery to develop the record, but did not. (Report, pp. 1-4.)

A review of EAMS reveals that applicant's official address of record (OAR) is 1850 S Diamond Bar, Apartment 804, Diamond Bar, CA, 91765.

DISCUSSION

A petition for reconsideration must be filed and received by the Appeals Board within twenty days of the service of the final order (plus an additional five days if service of the decision is by any method other than personal service, including by mail, upon an address in California). (§ 5903; Cal. Code Regs., tit. 8, § 10605; *Oliver v. Structural Services* (1978) 43 Cal.Comp.Cases 596.) This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely Petition for Reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Pursuant to WCAB Rule 10628(a), the WCJ is required to serve the injured employee, regardless of whether or not the employee is represented, with any final order, decision or award issued on a disputed issue and may not designate a party's attorney to serve any such final order, decision or award. (Cal. Code Regs., tit. 8, § 10628.)

Here, the record reveals that instead of serving applicant with the F&O, the WCJ designated defendant's counsel, Michael G. McConville of Floyd, Skeren and Kelly, to serve the F&O on all the parties. Because service of the F&O did not comply with WCAB Rule 10628, we consider it defective.

Where service or the proof of service is defective, the time to file a petition for reconsideration is measured from the date the party receives the order in question. (*Hartford*

Accident & Indemnity Co. v. Workers' Comp. Appeals Board (Phillips) (1978) 86 Cal.App.3d 1, 3-4 [43 Cal.Comp.Cases 1193].)

Here, the record shows that on July 18, 2023, the WCJ mailed a courtesy copy of the F&O to 1850 South Diamond Bar, but to apartment number 808, not apartment 804 as provided by the OAR. (Proof of Service of Courtesy Copy of Findings and Order, July 18, 2023.) On September 6, 2023, defendant mailed a copy of the F&O to 1850 South Diamond Bar, apartment 804, as provided by applicant's OAR. (Proof of Service of Findings and Order, Revised, September 7, 2023.) However, defendant's Answer asserts that this copy went undelivered. (Answer, p. 2:12-14.)

Hence, because the original service of the F&O was defective, because the initial attempt to serve a copy of the F&O was defective, and because defendant asserts that the copy of the F&O it mailed to applicant at her OAR went undelivered, there are no grounds to conclude that applicant received the F&O. Accordingly, we will treat the Petition as timely and evaluate its merits.

Applicant contends that the WCJ erroneously failed to order an additional panel in psychiatry; and, in consequence, failed to find that applicant sustained injury to her psyche. Specifically, applicant contends that the WCJ effectively denied discovery on the claimed psyche injury by denying her request for an additional panel in psychiatry on the spurious grounds that she had not alleged a psyche injury and not diligently prosecuted her putative psyche claim.

Here, as stated in the Opinion on Decision and the Report, the WCJ opined that applicant had not demonstrated good cause for an additional panel in psychiatry because she had not alleged a psyche injury and had otherwise delayed prosecution of her claim. (Opinion on Decision, pp. 2-3; Report, pp. 1-4.)

But the pleadings record reveals that (1) the application for adjudication did include a psyche injury claim; and (2) the parties did not frame the issue of whether applicant's claim should be dismissed for failure to prosecute as one for trial. (Application for Adjudication, October 24, 2018, p. 9; Minutes of Hearing and Summary of Evidence, January 25, 2023, pp. 2:17-3:13.) It follows that the finding that no good cause exists for an additional panel in psychiatry is without support.

Additionally, we are persuaded that the WCJ should have determined whether good cause exists for an additional panel in psychiatry, an issue pending in this matter since May 15, 2019, before holding a hearing on the issue of whether applicant sustained injury to the psyche. Because

determination of the psychiatric panel issue was delayed until the very hearing at which the existence of the psyche injury itself was to be determined, applicant was effectively denied an opportunity to be heard on her claim to discovery on her psyche injury claim—and effectively foreclosed from obtaining certain discovery sought for the purpose of proving her claim without due process. (See *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158 [97 Cal. Rptr. 2d 852, 65 Cal.Comp.Cases 805] (stating that all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [32 Cal. Rptr. 2d 293, 59 Cal.Comp.Cases 461]; *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 285 Cal. Rptr. 222 [56 Cal.Comp.Cases 537] (finding that due process requires that a party receive notice and an opportunity to be heard before an action adverse to its interest is taken).)

Thus we conclude that the record should be developed on the issues of whether good cause exists for an additional panel in psychiatry and whether applicant sustained injury to the psyche. Accordingly, we will substitute findings that defer the issues of whether good cause exists for an additional panel in psychiatry and of whether applicant sustained injury to the psyche. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal. Comp. Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also Labor Code § 5313.)

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that (1) applicant did not sustain injury to her upper extremities and shoulders; (2) defendant did not untimely deny applicant's claim; (3) defendant did not deny the claim in bad faith; and (4) defer the issues of whether good cause exists for an additional panel in psychiatry, whether applicant sustained injury to her psyche, and all other issues, as appropriate; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on July 14, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on July 14, 2023 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Erika Fractious, while employed from October 26, 2015 to April 11, 2018 as a claims examiner (group 111), by defendant Marriott International, Inc., did not sustain injury arising out of and in the course of employment to upper extremities and shoulders.
2. The issue of whether good cause exists to support an additional panel in psychiatry is deferred.
3. The issue of whether applicant sustained injury to her psyche is deferred.
4. Defendant did not untimely deny applicant's claim.
5. Defendant did not deny applicant's claim in bad faith.
6. All other issues are deferred, as appropriate.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 19, 2023

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

**ERIKA FRACTIOUS
LAW OFFICES OF TELLERIA, TELLERIA & LEVY
FLOYD, SKEREN, MANUKIAN & LANGEVIN**

SRO/es

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

CS