

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

MARGARITA BAEZ, *Applicant*

vs.

**S & H PACKING & SALES COMPANY, INC., dba SEASON PRODUCE; CYRPRESS
INSURANCE COMPANY by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,
*Defendants***

**Adjudication Number: ADJ15392354
Los Angeles District Office**

**OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION**

We have considered the allegations of applicant's Petition for 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 deny the Petition as one seeking reconsideration.

The WCJ's Report states that applicant's petition was untimely filed. The proof of service for the Findings and Order reflects that it was served on February 8, 2022. There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) Twenty-five days from February 8, 2022 falls on March 5, 2022, which was a Saturday.¹ Pursuant to WCAB Rule 10600, applicant had until the following business day, March 7, 2022, to file her petition. Thus, her petition was timely filed on March 7, 2022.

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

¹ The Appeals Board takes judicial notice of the day of the week that March 5, 2022 fell on pursuant to Evidence Code section 451(f). (Evid. Code, § 451(f).)

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 that applicant claims injury "while employed during the period October 15, 2020 to October 15, 2021" by defendant. Employment 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's delay letter was sufficient to trigger the qualified medical evaluator (QME) panel process per sections 4060 and 4062.2. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant 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, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy. (See *Chavarria v. Crews of California, Inc.* (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS

534] [the Appeals Board held that a party may request a QME panel per sections 4060 and 4062.2(b) by using a claim delay notice as a mailing of a request for a medical evaluation].²

Therefore, we will deny the petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on February 8, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR (See Attached Concurring Opinion.)

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 4, 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
HARRIGAN POLAN KAPLAN & BOLDY
MARGARITA BAEZ**

AI/pc

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

² Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

CONCURRING OPINION OF COMMISSIONER DEIDRA LOWE

I concur with the disposition reached here. Although our panel decisions are not binding precedent, I write separately to address the prior opinion that issued in *Rayo v. Certi-Fresh Foods, Inc.* (2018) 83 Cal.Comp.Cases 939, which I participated in as a panelist. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].)

In *Rayo*, we affirmed the WCJ's decision that a represented applicant prematurely obtained a QME panel pursuant to section 4060 because the defendant had not requested a medical evaluation in accordance with the Labor Code. (*Rayo, supra*, 83 Cal.Comp.Cases at p. 942.) As with Chair Zalewski in *Chavarria v. Crews of California, Inc.* (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS 534] and Commissioner Sweeney in *Gonzalez v. Huntington Drive Health Rehabilitation* (October 18, 2021, ADJ14413931) [2021 Cal. Wrk. Comp. P.D. LEXIS 266], I have since reconsidered the disposition in *Rayo* and am persuaded that a delay letter may be utilized to request a panel per sections 4060 and 4062.2. Accordingly, I now adopt the analysis outlined in *Chavarria*.

Therefore, I concur with the disposition reached here.



WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 4, 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
HARRIGAN POLAN KAPLAN & BOLDY
MARGARITA BAEZ**

AI/pc

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