

**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 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.

Defendant seeks removal of the Findings of Fact and Opinion on Decision (Findings) issued by the workers' compensation administrative law judge (WCJ) on December 28, 2020. By the Findings, the WCJ found that applicant's request for a qualified medical evaluator (QME) panel was made 16 days after defendant's delay notice and the panel was valid.

Defendant contends that applicant's QME panel was invalid because it was prematurely requested without waiting the requisite time for mailing.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will amend the Findings to find that applicant's QME panel (panel number 7336281) is invalid (Finding of Fact No. 3).

FACTUAL BACKGROUND

Applicant claims injury to the bilateral upper extremities, shoulders, arms, hands and fingers through February 19, 2020 while employed as a farm laborer by Gonzalez Ag, Inc. An Application for Adjudication of Claim was filed by applicant's attorney on April 29, 2020. (Applicant's Exhibit No. 2, Application for Adjudication of Claim, April 29, 2020.)

On May 4, 2020, the insurance carrier sent applicant a Notice Regarding Delay of Workers' Compensation Benefit. (Applicant's Exhibit No. 5, Chiropractic Panel Number 7336281, May 20, 2020, exh. pp. 5-6.) The Notice shows that the carrier's address is located in "Kansas City, MO." (*Id.*)

On May 20, 2020, applicant requested and obtained QME panel number 7336281 in the specialty of chiropractic. (Applicant's Exhibit No. 5, Chiropractic Panel Number 7336281, May 20, 2020, exh. p. 1.) The panel request identified the dispute type as a compensability dispute citing Labor Code section 4060. (*Id.* at exh. p. 4; Lab. Code, § 4060.)¹ Applicant utilized defendant's May 4, 2020 claim delay notice in support of his panel request. (Applicant's Exhibit No. 5, Chiropractic Panel Number 7336281, May 20, 2020, exh. pp. 4-6.)

Defendant subsequently sent applicant a Notice Regarding Denial of Compensation Benefits on July 20, 2020. (Joint Exhibit No. 2, Denial letter, July 20, 2020.)

The matter proceeded to trial on October 22, 2020 on the sole issue of the validity of QME panel number 7336281. (Minutes of Hearing and Summary of Evidence, October 22, 2020, p. 2.) Both parties filed post-trial briefs. In its brief, defendant argued that applicant's panel request was invalid because the panel was requested before the 20-day waiting period, the panel was improperly served and the claim delay notice may not be used to request a panel under section 4060.

The WCJ issued the resulting Findings as outlined above. In the Opinion on Decision, the WCJ determined that the panel request was not premature since applicant waited 16 days from the claim delay notice before requesting the panel.

DISCUSSION

I.

Defendant sought removal of the Findings. 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 of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See

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

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.

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.

II.

Although the Findings contain a finding that is final, defendant only challenges the WCJ's determination that the QME panel obtained by applicant is valid. This is an interlocutory decision regarding discovery and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Section 4060 provides as follows in relevant part:

- (a) This section shall apply to disputes over the compensability of any injury.
This section shall not apply where injury to any part or parts of the body is

accepted as compensable by the employer.

...

- (c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.

(Lab. Code, § 4060(a) and (c).)

To obtain a QME panel in a represented case, section 4062.2 provides, in relevant part, as follows:

- (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
- (b) No earlier than **the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060** or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, **either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation.** The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.

(Lab. Code, § 4062.2(a)-(b), emphasis added.)

WCAB Rule 10605 provides as follows in relevant part:

- (a) **When any document is served by mail, fax, e-mail or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended 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;

- (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” 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, even if the method of service actually used was fax, e-mail or other agreed-upon method of service.

(Cal. Code Regs., tit. 8, former § 10507(a)(1)-(2), (b), now § 10605(a)(1)-(2), (b) (eff. Jan. 1, 2020), emphasis added.)

It is acknowledged that the Appeals Board has previously found that a party may use a claim delay notice to request a QME panel per sections 4060 and 4062.2. (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, in this matter, either party could have utilized defendant’s May 4, 2020 claim delay notice to request a QME panel.

However, in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc), the en banc decision held that the period for seeking agreement on an agreed medical evaluator (AME) under the previous version of section 4062.2(b) was extended by the mailbox rule if the first written AME proposal was made by any method other than personal service. Former section 4062.2(b) provided that the procedure for selecting an AME commences with either party “making a written request naming at least one proposed physician to be the evaluator.” (Former Lab. Code, § 4062.2(b) amended by Stats 2012, ch. 363, § 29, eff. Jan. 1, 2013.) The Appeals Board in *Messele* determined that “the WCAB’s Rules govern service if they differ from CCP section 1013.” (*Messele, supra*, 76 Cal.Comp.Cases at p. 965.) Pursuant to this conclusion, the Appeals Board held that former WCAB “Rule 10507(a)(1) extends for five calendar days the period of time for exercising or performing any right or duty to act or respond, if a document is served by any method other than personal service on a party whose physical address is within California.” (*Id.*) Therefore, written proposals to utilize an AME served by any method other than personal service under former section 4062.2(b) were subject to former WCAB Rule 10507 and the period before a party could exercise the right to request a QME panel was extended by the applicable time for mailing per the Rule.

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).)

The current version of section 4062.2(b) no longer requires the parties to seek agreement on an AME before requesting a panel. Instead, section 4062.2(b) requires the requesting party to wait until the “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(b) *plus the applicable additional time for mailing* per current WCAB Rule 10605 before they may exercise the right to request a panel.

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. This conclusion would be correct if the insurance carrier’s address of record was within California and the applicable mailbox extension was five calendar days per WCAB Rule 10605(a)(1). WCAB Rule 10605(a)(2) extends the period for exercising any right by ten calendar days instead of five days from the date of service if the place of mailing of the party being served is outside of California but within the United States. The carrier’s address of record is located in Kansas City, MO, i.e., outside of California but within the United States. Consequently, applicant was obligated to wait ten days from the date of mailing of the May 4, 2020 claim delay notice per section 4062.2(b) plus an additional ten days per WCAB Rule 10605(a)(2) before requesting a panel. His panel request on May 20, 2020 was thus premature and the resulting panel is invalid.

In conclusion, we will amend the Findings to find that QME panel number 7336281 is invalid (Finding of Fact No. 3).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Opinion on Decision issued by the WCJ on December 28, 2020 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. QME Panel Number 7336281 is invalid.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 4, 2021

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**

AI/pc

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