WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TSEGAY MESSELE, ***Applicant,*** **vs.** **PITCO FOODS, INC.; CALIFORNIA INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ7232076** **OPINION AND DECISION AFTER RECONSIDERATION, ORDER GRANTING REMOVAL, AND DECISION AFTER REMOVAL (EN BANC)**

The Appeals Board previously granted applicant's petition for reconsideration of the January 20, 2011 decision of the workers' compensation administrative law judge (WCJ), wherein it was found that the properly assigned qualified medical evaluator (QME) panel in this case was the panel requested by defendant, not the panel requested by applicant.[1]

On reconsideration, applicant contends that the WCJ erred in applying Code of Civil Procedure (CCP) section 1013 to extend by five calendar days the 10-day time period provided in Labor Code section 4062.2(b) for the parties to agree on an agreed medical evaluator (AME), during which time period the parties may not request a panel QME. Applicant further contends that, if CCP section 1013 is held to apply, the five-day extension would invalidate defendant's panel QME request as well as applicant's request.

Because of the important legal issues regarding the timeline set forth in Labor Code section 4062.2(b) for selecting an AME and requesting a panel QME, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc

[1] The caption of our Opinion and Order Granting Petition for Reconsideration, as well as the WCJ's Finding of Fact and applicant's Petition for Reconsideration, show applicant's name as "Messele Tsegay." As his correct name appears to be "Tsegay Messele," we have used that name in this opinion and have corrected the record in the Electronic Adjudication Management System (EAMS).

decision. (Lab. Code, § 115.)[2]

For the reasons discussed below, we hold: (1) when the first written AME proposal is "made" by mail or by any method other than personal service, the period for seeking agreement on an AME under Labor Code section 4062.2(b) is extended five calendar days if the physical address of the party being served with the first written proposal is within California;[3] and (2) the time period set forth in Labor Code section 4062.2(b) for seeking agreement on an AME starts with the day after the date of the first written proposal and includes the last day.[4]

I. BACKGROUND

On January 29, 2010, applicant sustained an admitted industrial injury to his hand. Amendments to his application added additional body parts.

On April 20, 2010, defendant objected by mail to the primary treating physician's opinion, pursuant to Labor Code section 4062, and proposed a physician to serve as AME. On April 26, 2010, applicant's attorney proposed via fax several different physicians to serve as AME. On May 1, 2010, applicant submitted to the Division of Workers' Compensation (DWC) Medical Unit a QME panel request (Form 106). (See Cal. Code Regs., tit. 8, § 106.) Applicant requested a pain medicine specialist panel, indicated that the treating physician was a hand specialist, and indicated that the opposing party's specialty preference was a hand specialist.[5] On May 4, 2010, defendant submitted a QME panel request.

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[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedential decision in accordance with Labor Code section 115 and WCAB Rule 10341, this en banc decision is being adopted as a precedential decision in accordance with Government Code section 11425.60(b).

[3] To avoid cumbersome verbiage and to reflect the facts of this case, this opinion generally refers to a "five calendar day extension." Our holding regarding an extension of the 10-day time period in cases of non-personal service of the first written AME proposal nonetheless applies in those circumstances described in WCAB Rule 10507 (Cal. Code Regs., tit. 8, § 10507) where the extension is for 10 or 20 calendar days, not five days. Rule 10507 provides a 10 calendar day extension for service on a party, lien claimant, attorney, or other agent of record with a physical address outside of California but within the United States, and a 20 calendar day extension for those with a physical address outside the United States. (See also Code Civ. Proc., § 1013(a).)

[4] Ordinarily, the time period for agreeing on an AME under Labor Code section 4062.2(b) is 10 days, and the last day of that period will therefore be the 10th day; however, the parties may agree to additional time, not to exceed 20 days.

[5] Labor Code section 4062.2 requires the party submitting the request to 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."

Defendant requested a hand specialist panel and indicated that the treating physician was an orthopedic specialist. Defendant did not state the opposing party's specialty preference.

The DWC Medical Unit received applicant's request on May 5, 2010, and issued a panel consisting of three physicians in the specialty of pain medicine. The DWC Medical Unit received defendant's request on May 10, 2010, and issued a panel of three hand specialists. On October 6, 2010, applicant was evaluated by Brendan Morley, M.D., one of the physicians on applicant's panel. (See Defendant's Exhibit E.)

Trial was held on December 29, 2010. The "only issue" was "which of two QME panels is proper in this matter." (Minutes of Hearing, 1:40-41.) Additionally, the Minutes of Hearing state,

> "As sub issues:
>
> "Defendant contends that the 'Mail Box Rule' applies to extend the period for applicant to request a panel to 15 days, rather than the 10 days provided by regulation. In addition, defendant contends that the specialty of physician selected by applicant is improper and that the proper specialty is orthopedics." (*Id*. at 2:3-10.)

The WCJ served his Finding of Fact on January 20, 2011. He explained in his Opinion on Decision that if CCP section 1013(a) applies to extend by five calendar days the 10 days within which to agree on an AME, the first day on which either party could request a panel was May 6, 2010. Relying on *Poster v. Southern California Rapid Transit District* (1990) 52 Cal.3d 266 (*Poster*), and distinguishing *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679 [57 Cal.Comp.Cases 644] (*Camper*) and *Alvarado v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1142 (writ den.) (*Alvarado*), the WCJ concluded that CCP section 1013(a) does apply. He found that applicant's request was premature and that defendant's panel was the proper one. He did not make any finding regarding the appropriate specialty.

Applicant filed a petition for reconsideration. Defendant filed an answer.

In his Report and Recommendation on Petition for Reconsideration (Report), the WCJ recommended that we grant removal and find both panel requests premature.

We granted reconsideration on April 13, 2011.

II. DISCUSSION

We note initially that applicant's petition seeks reconsideration of a Finding of Fact determining which QME panel was properly assigned. The WCJ's finding did not determine any substantive rights or liabilities of the parties and was, therefore, not a "final order, decision, or award" within the meaning of Labor Code sections 5900 and 5903. (See *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) Because the WCJ did not issue a final order, his decision was not properly reviewable by reconsideration. Applicant's petition should have requested removal instead of reconsideration, and we erred in granting reconsideration instead of removal. (See Lab. Code, § 5310; Cal. Code Regs., tit. 8, § 10843.) To correct this error, we will vacate our April 13, 2011 Opinion and Order Granting Petition for Reconsideration and, deeming applicant's petition as one for removal, we will grant removal and issue our Decision After Removal.

Under Labor Code section 4062(a), if an injured employee is represented by an attorney the parties have 20 days to object to a medical determination by the treating physician concerning any medical issue not covered by sections 4060 or 4061 and not subject to section 4610. "If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained." (Lab. Code, § 4062(a).)[6]

Labor Code section 4062.2(b) provides,

> "If either party requests a medical evaluation pursuant to Section 4060, 4061, or 4062, **either party may commence the selection process for an agreed medical evaluator by making a written request naming at least one proposed physician to be the evaluator. The parties shall seek agreement with the other party on the physician**, who need not be a qualified medical evaluator, to prepare a report resolving the disputed

[6] Labor Code section 4062(a) provides that the period of time within which an objection may be made, when an employee is not represented by an attorney, is 30 days. The employer is then required to provide the unrepresented employee a form with which to request a QME panel, (see Cal. Code Regs., tit. 8, § 105), for resolution of the medical dispute pursuant to Labor Code section 4062.1.

> issue. **If no agreement is reached within 10 days of the first written proposal that names a proposed agreed medical evaluator**, or any additional time not to exceed 20 days agreed to by the parties, **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." (Emphasis added.)

A. When the First Written AME Proposal is "Made" by Mail or by Any Method Other Than Personal Service, the Period for Seeking Agreement on an AME Under Labor Code Section 4062.2(b) is Extended Five Calendar Days if the Physical Address of the Party Being Served with the First Written Proposal is Within California.

1. Code of Civil Procedure Section 1013(a)

CCP section 1013, subdivision (a) provides,

> "In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence. Service is complete at the time of the deposit, but any period of notice **and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail**, if the place of address and the place of mailing is within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States, but the extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court." (Emphasis added.)

Subdivision (c) governs service by Express Mail, subdivision (e) governs facsimile transmission, and subdivision (g) governs electronic service, all of which provide an extension of two court days.

In *Poster*, *supra*, 52 Cal.3d 266, a personal injury case cited by defendant and relied on by the WCJ, the plaintiff had served a settlement offer by mail on the defendant pursuant to CCP section 998 and Civil Code section 3291. CCP section 998 required a response within 30 days after the offer was made, if the defendant wanted to accept the offer. CCP section 998 did not specifically require service of the settlement offer by mail, but it stated that "any party may serve an offer in writing"; and the plaintiff's settlement offer was in fact served by mail. The defendant accepted the offer on the 32nd day after service by mail of the plaintiff's offer. Noting that CCP section 1013 has been held inapplicable to statutes that set forth jurisdictional deadlines, the Supreme Court held that the 30-day response requirement of CCP section 998 was not jurisdictional, and that CCP section 1013 applied to extend the period to respond by five days.

The Court stated, "Under section 998, the 30-day period runs from the time the offer is 'made.' Because an offeror 'makes' the offer by serving it in writing, when a section 998 offer is served by mail it is clear that the statutory period for response runs from the service by mail." (52 Cal.3d at p. 274, fn. 4.)

With regard to CCP section 1013, the Court said,

> "By its terms, section 1013 appears clearly to apply to the time period prescribed by section 998 for accepting statutory offers of compromise. Section 1013 applies to the service by mail of a 'notice or other paper' which would certainly include a section 998 settlement offer. And by specifically extending for five days 'any prescribed period…to do any act or make any response' to any paper served by mail, section 1013 appears clearly to apply to the time period for accepting a statutory settlement offer. In light of the language of section 1013, and the general applicability of its provisions, there appears to be no sound reason not to apply the statute in this context." (52 Cal.3d at p. 274.) (Footnote omitted.)

Accordingly, the Court concluded "that when a statutory settlement offer pursuant to section 998 is served by mail, the provisions of section 1013 apply and extend the 30-day period for acceptance of the offer by 5 days." (52 Cal.3d at p. 275.)

In *Camper*, *supra*, 3 Cal.4th 679 [57 Cal.Comp.Cases 644], cited by applicant in the present case, the employee filed a petition for writ of review 50 days after the Appeals Board issued its decision in

response to the employee's petition for reconsideration. The Supreme Court held CCP section 1013 inapplicable to the 45-day period within which to file a petition for writ of review from a decision of the Appeals Board. Labor Code section 5950 provided that "application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeals board's own motion, within 45 days *after the filing* of the order, decision, or award following reconsideration." (Emphasis added.) Because the Court determined that the "operative trigger" for the time period set forth in Labor Code section 5950 was the "filing" of the denial of reconsideration or the decision following reconsideration, and not "service" of the order, the Court found no basis for extending the 45-day period. (3 Cal.4th at p. 684 [57 Cal.Comp.Cases at p. 647].) The Court explained that "'cases have consistently held that where a prescribed time period is commenced by some circumstance, act or occurrence other than service,'" CCP section 1013 will not apply; but, "'where a prescribed time period is triggered by the term "service" of a notice, document or request then section 1013 will extend the period.'" (3 Cal.4th at pp. 684-685 [57 Cal.Comp.Cases at p. 647].)

The Court specifically considered its previous decision in *Poster* and found it "clearly distinguishable." (3 Cal.4th at p. 686 [57 Cal.Comp.Cases at p. 648].)

> "In *Poster*, we held that the 30-day period for the acceptance of a statutory settlement offer pursuant to Code of Civil Procedure section 998 is extended by section 1013 when it is served by mail. Section 998 provides that the applicable time period runs from the time that the offer is 'made.' We reasoned that '[b]ecause an offeror "makes" the offer by serving it in writing, when a section 998 offer is served by mail it is clear that the statutory period for response runs from the service by mail.' (*Poster, supra,* 52 Cal.3d at p. 274, fn. 4.) As **the offer cannot be 'made' without communicating it through service**, the trigger adopted by the Legislature for the prescribed time period in section 998 necessarily included service; the same cannot be said about the trigger adopted for Labor Code section 5950. Filing is accomplished independently of service." (3 Cal.4th at p. 686 [57 Cal.Comp.Cases at pp. 648-649].) (Emphasis added.)

The *Camper* Court added that even if it were persuaded that Labor Code section 5950, when read in light of the WCAB Rules,[7] incorporated the CCP section 1013 extension, it would still hold the

[7] At the time of the *Camper* decision, WCAB Rule 10507 (Cal. Code. Regs., tit. 8, § 10507) provided, "The requirements of Code of Civil Procedure Section 1013 shall govern all service by mail." See this opinion's discussion below of Rule 10507, as amended effective November 17, 2008.

extension inapplicable because section 1013's extension for service by mail has been held inapplicable to jurisdictional deadlines; and "it is now too well established to question that the time limitation set forth in Labor Code section 5950 is jurisdictional." (3 Cal.4th at p. 686 [57 Cal.Comp.Cases at p. 649].)

Similarly, in *Alvarado*, *supra,* 72 Cal.Comp.Cases 1142,[8] the Appeals Board panel found CCP section 1013 inapplicable to extend the time for a party to strike a physician's name from a QME panel, because the operative trigger for the time period was not service. The trigger in *Alvarado* was assignment of the panel: "the time limits prescribed by Labor Code § 4062.2(c) run from the date of assignment of the three-member panel, not from service of the panel." (72 Cal.Comp.Cases at p. 1145.)

While none of the cases cited by the parties are directly on point, they provide some guidance. As the Supreme Court said in *Poster*, an offer is "made" when it is served in writing. The Court further explained in *Camper* that an offer cannot be made "without communicating it through service." Labor Code section 4062.2(b) provides 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." If that written request is not served on the other party in some manner, the AME selection process cannot commence. In the strictest, most literal sense, Labor Code section 4062.2(b) does not specifically require "service" of the first written AME proposal. No triggering event is specified for the 10-day period other than the "making" of the first written proposal. However, consistent with the Supreme Court's decisions in *Poster* and *Camper*, we do not consider a request made unless it is communicated in writing to the other party. Applicant's attempt to read significance into Labor Code section 4062.2(b)'s explicit requirement to "serve" a copy of the QME panel request on the other party and the absence of such an explicit requirement for the first written AME proposal is unpersuasive. The party requesting a QME panel submits that request to the DWC Medical Unit. It, therefore, makes sense to require explicitly that a

[8] "Writ denied" cases are citable authority as to the holding of the Appeals Board panel in its underlying decision. (E.g., *Farmers Ins. Group of Companies v. Workers' Comp. Appeals Bd*. (*Sanchez*) (2002) 104 Cal.App.4th 684, 689, fn. 4 [67 Cal.Comp.Cases 1545]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745].) However, unlike Appeals Board en banc decisions, which are binding on WCJs and Appeals Board panels (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd*., *supra*, 96 Cal.App.4th at p. 1425, fn. 6), Appeals Board panel decisions, even if appellate review is denied, are not binding precedent and have no stare decisis effect. (*MacDonald v. Western Asbestos Co*. (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).)

copy of the request be served on the opposing party. The written proposal for an AME, on the other hand, is communicated directly to the opposing party; there is no need for a redundant service requirement.

Joint selection of an AME cannot occur if the process is not initiated by communication of the first written proposal. Therefore, when the first written AME proposal is made by mail, the five calendar day extension applies and guarantees the parties the full 10-day period determined appropriate by the Legislature for negotiation and selection of an AME.

We will now consider additional authority for the five calendar day extension.

2. Labor Code and WCAB Rules

Labor Code section 5708 states that the WCAB is not bound by the common law or statutory rules of evidence and procedure, but is bound by Division 4 of the Labor Code and the WCAB's own Rules of Practice and Procedure.

Labor Code section 5316 provides, "Any notice, order, or decision required by this division to be served upon any person either before, during, or after the institution of any proceeding before the appeals board, may be served in the manner provided by Chapter 5, Title 14 of Part 2 of the Code of Civil Procedure, unless otherwise directed by the appeals board. In the latter event the document shall be served in accordance with the order or direction of the appeals board." Chapter 5, Title 14 of Part 2 of the CCP includes section 1013.

WCAB Rule 10507, as effective November 17, 2008, "otherwise" directs, as follows:

> "(a) If a 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:
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> "(1) five calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is within California;
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> "(2) ten calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is outside of California but within the United States; and

> "(3) twenty calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is outside the United States.
>
> "(b) For purposes of this section, 'physical address' means the street address or Post Office Box of the party, lien claimant, 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.
>
> "(c) This rule applies whether service is made by the Workers' Compensation Appeals Board, a party, a lien claimant, or an attorney or other agent of record."

Thus, 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. Labor Code section 5316 applies to service "upon any person," and subdivision (c) of Rule 10507 expressly provides that the rule applies to documents served, not just by the WCAB, but also by "a party, a lien claimant, or an attorney or other agent of record." Written proposals to utilize an AME fall within these provisions, and the period in which to exercise the right to select an AME is, therefore, extended as provided by Rule 10507.

When the WCAB amended Rule 10507, effective November 17, 2008, it made a deliberate decision to deviate from the provisions of CCP section 1013 pertaining to service by methods other than mail. Describing the differences between CCP section 1013 and the proposed amended Rule 10507, the Final Statement of Reasons for Rule 10507 stated at page 30, "The WCAB has concluded, however, that less confusion will result if the time extensions of five calendar days, ten calendar days, and twenty calendar days apply to ***all*** non-personal service, whether made by first-class mail or by some other authorized method."[9]

Pursuant to Labor Code sections 5708 and 5316, the WCAB's Rules govern service if they differ from CCP section 1013. Because current Rule 10507 provides a five calendar day extension for service

[9] (http://www.dir.ca.gov/WCAB/WCABProposedRegulations/WCAB_RulesofPracticeandProcedure/WCAB_FSOR.doc.) (Emphasis in original.)

by mail, fax, e-mail, or any method other than personal service, its provisions are no longer identical to CCP section 1013; and Rule 10507 is, therefore, the controlling authority.

In the present case, defendant mailed its first written AME proposal, so the extensions provided by Rule 10507 and CCP section 1013(a) are the same — five calendar days.[10] The record in EAMS shows that applicant designated U.S. mail as the preferred method of service. (See Cal. Code Regs., tit. 8, § 10218(a).) Defendant's written AME proposal was sent by mail on April 20, 2010, and applicant responded to it six days later. While there may be other cases where the exact date of service of the first written AME proposal is disputed,[11] there is no doubt or dispute in this case. The WCJ was correct in calculating that May 6, 2010, the 16th day after service of the first written proposal, was the first day on which a valid request for a QME panel could be made. Applicant's QME panel request shows a "Request date" of May 1, 2010, and defendant's request shows a "Request date" of May 4, 2010.

Applicant's argument that his request was timely is simple. His request was made on the 11th day, and he argued that the five calendar day extension is inapplicable – an argument we reject. Applicant's request was premature.

Defendant's argument that its request was timely is not clearly stated: "[W]hen Defendant made their request for a panel of QMEs waiting the 10 days plus 5 days on May 4, 2010, they waited the proper time as required as it was received by the DWC-Medical Unit on May 10, 2010." (Defendant's Answer to Applicant's Petition for Reconsideration, 3:11-14.) Defendant acknowledges that the five calendar day extension applies, but its conclusion that its request was timely is incorrect. Pursuant to the rule for computing time, which is discussed below and applied in this opinion, defendant's request —

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[10] See WCAB Rule 10508 (Cal. Code Regs., tit. 8, § 10508), which provides that the act or response may be performed or exercised upon the next business day, if the last day for exercising or performing any right or duty to act or respond falls on a weekend or on a holiday for which the WCAB offices are closed. Pursuant to Rule 10508 and pursuant to the rule for computing time discussed below, if the 15th day for agreeing on an AME falls on a weekend or holiday, the next business day counts as the 15th day; and a panel may be requested on the following day, the 16th day. For the purpose of determining when a panel request may be made, it does not matter if the 10th day after the first written AME proposal falls on a weekend or holiday, unless the proposal was personally served, in which case the 10th day would be the next business day.

[11] Although Labor Code section 4062.2(b) may not explicitly require "service" of the AME proposal, the wise practitioner will avoid any doubt as to when the first written proposal was "made" by including proof of service. (See Cal. Code Regs., tit. 8, § 10505.)

made on the 14th day — was premature as well. Defendant is also incorrect if it argues that the date the DWC Medical Unit received its request is somehow relevant to the request's timeliness. The action specified in Labor Code section 4062.2(b), which may not occur until after completion of the required time period for negotiating an AME, is the "request" for a panel QME, not receipt of the request.

We add that while the time periods set forth in section 4062.2(b) are "mandatory" they are not "jurisdictional" in the "fundamental sense" discussed in *Poster*, i.e., "failure to comply does not render the proceeding void." (52 Cal.3d at pp. 274-275.) Hence, to the extent one may argue that Rule 10507, like CCP section 1013, is inapplicable to statutes that set forth jurisdictional deadlines, Labor Code section 4062.2(b) presents no such impediment.

B. The Time Period Set Forth in Labor Code Section 4062.2(b) for Seeking Agreement on an AME Starts With the Day After the Date of the First Written Proposal and Includes the Last Day.

CCP section 12, Civil Code section 10, and Government Code section 6800 provide, "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." These statutory provisions state "the ordinary rule of computation of time, which excludes the first day and includes the last… ." (*Ley v. Dominguez* (1931) 212 Cal. 587, 594.) "Where the law requires or permits an act to be done within a statutory period of time or number of days, the question becomes one simply of the measurement of time, and so measuring time the first day is excluded, all of the last day included, and fractions of days are totally and universally disregarded. The acting party has all of the last day within which to proceed." (*Scoville v. Anderson* (1901) 131 Cal. 590, 596.) "The gravest considerations of public order and security require that the method of computing time be definite and certain. Before a given case will be deemed to come under an exception to the general rule the intention must be clearly expressed that a different method of computation was provided for." (*Ley v. Dominguez, supra,* 212 Cal. at pp. 594-595.) "Absent a compelling reason for a departure, this rule governs the calculation of *all* statutorily prescribed time periods. Our Supreme Court has encouraged the use of uniform rules so that the method of computing time not be a source of doubt or confusion." (*In re Anthony B*. (2002) 104 Cal.App.4th 677, 682 (italics in original); see also *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154,

1161.)

In *Johnson v. Kaeser* (1925) 196 Cal. 686, a conditional sales contract provided for monthly installment payments to be made on the first day of each month or "within ten days thereafter." The Court found premature an action brought for default in the payment of an installment on the 11th day of the month, stating,

> "The installments were due and payable on the first day of each month, or 'within ten days thereafter.' Thus the defendants, by the terms of the contract, had all of the eleventh day of May, 1923, to pay the installment for said month. In other words, the ten days began to run after the first day of the month, or on the second day thereof, the first day of the month being excluded in the computation of the time. (Civ. Code, sec. 10; Code Civ. Proc., sec. 12.) ... The action was brought on the eleventh day of May, the last day of the ten; hence the defendants, before action brought, were not given the full ten days to which they were entitled within which to make the May payment. The bringing of the action was, therefore, premature." (196 Cal. at pp. 700-701.)

In *Latinos Unidos de Napa v. City of Napa, supra*, 196 Cal.App.4th 1154, the Court applied CCP section 12 to compute the 30-day time period the city was required by Public Resources Code section 21152 to post a notice of determination. It found that the city had not demonstrated any "clear expression of intent, or compelling reason, to except the computation" of the 30-day period from the general rule of CCP section 12. (*Id.* at p. 1161.) Consistent with CCP section 12, the Court did not count the first day of posting. It found that the 30-day posting requirement was not satisfied because the notice of determination was not posted for the entire last day, i.e., the 30th day. Rejecting an argument of "substantial compliance," the Court emphasized, "Predictability and certainty are the twin guiding virtues that enable people to comply with legal requirements." (*Id.* at p. 1167.)

Pursuant to this "ordinary" rule for computing time, in those cases where the parties have not agreed to "additional time not to exceed 20 days" (Lab. Code, § 4062.2(b)), the 10-day time period for agreeing on an AME excludes the first day, the date of the first written proposal, and includes the last, i.e., the 10th, day. The parties have the entire 10th day in which to reach agreement on an AME, and a request for a panel QME filed before the end of the 10th day would be premature.

If the first written AME proposal is personally served, and the 10-day time period is therefore not

extended, a request for a panel QME may be made only after the 10th day, i.e., on the 11th day or later. If the first written proposal is served by mail or by any method other than personal service, and the 10-day time period for agreeing on an AME is consequently extended five calendar days, a request for a panel QME may be made only after the 15th day, i.e., on the 16th day or later.

Turning to the present case, we initially observe that applicant has not demonstrated any clear expression of intent or compelling reason not to compute the 10-day time period using the ordinary rule. (See *Latinos Unidos de Napa v. City of Napa, supra*, 196 Cal.App.4th at p. 1161; *Ley v. Dominguez, supra,* 212 Cal. at pp. 594-595.) The WCJ applied the rule correctly to determine that May 6, 2010 — the 16th day after the first written AME proposal — was the first day a panel request was permissible. Applicant's panel QME request was made on the 11th day after defendant's April 20, 2010 first written AME proposal — on May 1, 2010. The WCJ found it premature because he concluded that CCP section 1013(a) extends the time for agreeing on an AME by five calendar days. For the same reason, the WCJ concluded in his Report that defendant's May 4, 2010 panel QME request was also premature because it was made on May 4, 2010, the 14th day after defendant's April 20, 2010 AME proposal. The WCJ correctly stated that either party may file a request for a QME panel, but neither may do so before expiration of the 10-day period, plus five calendar days because the first written AME proposal was mailed.

CCP section 12, Civil Code section 10, and Government Code section 6800 state the general rule for computation of time, applicable to all statutorily prescribed time periods, regardless of whether they govern the time within which to do something or the time within which a particular action may not be taken. Pursuant to this rule, Labor Code section 4062.2(b) designates 10 days, excluding the date of the first written proposal, for agreement on an AME after which either party may request a QME panel. Labor Code section 4062.2(b) envisions use of this time period for negotiation and selection of an AME — the first and preferred option for obtaining a medical evaluation. This section commands that the "parties shall seek agreement with the other party on the physician…." This mandated time period provides each party with a guaranteed time within which to consider the other party's proposal(s) and to propose other AMEs, without the risk that the other party may request a QME panel during this period.

III. CONCLUSION

We will vacate our grant of reconsideration of the WCJ's non-final decision regarding the properly assigned QME panel. We deem applicant's petition for reconsideration a petition for removal, and we will grant removal. As our Decision After Removal, we will rescind the WCJ's finding that Panel No. 1148407 was properly assigned, since defendant's panel request, like applicant's, was premature.[12] By counting the days according to the rule articulated in CCP section 12, Civil Code section 10, and Government Code section 6800, and by extending by five calendar days the period for agreeing on an AME, because defendant's April 20, 2010 written proposal was made by mail, we determine that the earliest date either party could file a valid QME panel request was May 6, 2010. Therefore, the panels the DWC Medical Unit issued in response to applicant's May 1, 2010 request and defendant's May 4, 2010 request were not properly assigned.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that our April 13, 2011 Opinion and Order Granting Petition for Reconsideration is **VACATED**, and that applicant's petition for reconsideration of the January 20, 2011 Finding of Fact is deemed a petition for removal.

IT IS FURTHER ORDERED that removal is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the January 20, 2011 Finding of Fact is **RESCINDED** and the following **SUBSTITUTED** in lieu thereof:

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[12] Defendant notes at page 2, footnote 1, of its answer that applicant has requested another QME panel since filing his petition for reconsideration. Defendant argues that this request is invalid because "there is currently a valid panel according to Judge Shields' Finding of Fact." The validity of any panel requested after the filing of applicant's petition for reconsideration has not been considered by the WCJ and is not properly before us on reconsideration/removal.

FINDING OF FACT

Neither Panel No. 1148407 nor Panel No. 1148235 was properly assigned, because both panels were requested before expiration of the 10-day period set forth in Labor Code section 4062.2(b) for agreement on selection of an AME, plus five calendar days pursuant to WCAB Rule 10507 (Cal. Code Regs., tit. 8, § 10507).

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9/26/2011

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

JOHN HILL
TSEGAY MESSELE
MONIKA HIGHT

CB/bea/jmp