WORKERS’ COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAURIE NASH, *Applicant*

vs.

B2B STAFFING SERVICES; NOVA CASUALTY COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT, *Defendants*

Adjudication Number: ADJ15545648
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks removal of the Findings and Order (F&O) issued by the workers’ compensation administrative law judge (WCJ) on February 16, 2024. By the F&O, the WCJ found, in relevant part, that applicant is entitled to a replacement qualified medical evaluator (QME) panel. It was ordered that the Medical Unit issue a replacement QME panel.

Defendant contends that applicant is not entitled to a replacement QME panel because she failed to demonstrate that the QME’s initial report was untimely served in violation of Administrative Director (AD) Rule 38.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that removal be denied.

We have considered the allegations of defendant’s Petition for Removal (Petition), applicant’s answer, and the contents of the WCJ’s Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, we will grant defendant’s Petition as one seeking reconsideration and amend the F&O to find that applicant is not entitled to a replacement QME panel (Finding of Fact No. 9). Applicant’s request for a replacement QME panel will be ordered denied. We will also rescind the Findings of Fact discussing untimeliness of the QME’s report and applicant’s objection thereto (Finding of Fact Nos. 7-8).

FACTS

Applicant claimed specific injury to her cervical spine, shoulders, left ankle, and left knee while employed on October 2, 2021 as a licensed vocational nurse by defendant, B2B Staffing Services. (Minutes of Hearing and Orders (MOH), November 21, 2023, p. 2.)

The parties obtained a QME panel in neurology. Dr. Martin D. Levine, M.D., was the resulting physician from this panel. On May 25, 2023, Dr. Levine performed an initial evaluation of applicant and issued his QME report the same day. (Def. Exh. A.) The proof of service attached to the QME report was signed by an employee of Dr. Levine's office and stated that the report was served upon applicant's attorney's law office by U.S. mail on June 22, 2023. (Def. Exh. A, p. 37.)

On August 23, 2023, applicant's attorney filed a request for a replacement QME panel on the grounds of untimeliness. Applicant's attorney alleged that the QME report was not received until July 18, 2023 via email from defendant's attorney, and that she had objected to the QME report for lateness in an email to defendant's attorney on July 13, 2023. These emails were attached to the panel replacement request. (App. Ex. 1, pp. 1-2, 42.)

The parties subsequently proceeded to trial on the sole issue of "Whether good indication exists for the replacement of the PQME." (MOH, November 21, 2023.) The trial court admitted applicant's request for the replacement panel, as well as Dr. Levine's QME report and the attached proof of service. (Def. Exh. A; App. Exh. 1.) Neither party produced any testimony.

On February 16, 2024, the WCJ issued the disputed F&O. The WCJ found that the QME report was first served on or about July 18, 2023, that applicant had objected to the QME report prior to receipt, and that, as a result, applicant was entitled to a replacement panel in accordance with the applicable Labor Code sections and AD rules. The WCJ made this finding despite the fact that the QME's proof of service bore a service date of June 22, 2023. In the Opinion on Decision, the WCJ explained that, absent "affirmative evidence" verifying the QME's proof of service, defendant failed to rebut the July 18, 2023 service date alleged by applicant. (Opinion on Decision, p. 1; F&O, pp. 1-2.) In the Report, the WCJ further explained that:

> A proof of service from the PQME's office was received into evidence, and, generally, a proof of service is sufficient to establish the document was mailed on the date reflected in the proof of service. However, in this case, the proof of service was in dispute.

> No foundation was presented as to its accuracy by way of declaration or live testimony from the doctor's office. A proof of service is evidence that the document went out on the date it says. However, that proof of service is signed by an employee of the doctor's office and there was no testimony or declaration form that employee attesting to the proof of service.
>
> Applicant met his burden to show he did not receive the PQME's medical report within thirty (30) days of the date of the evaluation and timely objected to the lateness of the report prior to receipt of the report.

(Report, p. 3.)

The WCJ thus ordered a replacement QME panel. Defendant filed a timely, verified Petition for Removal of the F&O.

DISCUSSION

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 *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.)[1] 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 regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

[1] All statutory references hereinafter are to the Labor Code unless otherwise specified.

Although the F&O contains a finding that is final, defendant only challenges the WCJ's finding that applicant is entitled to a replacement QME panel. This is an interlocutory decision and is subject to the removal standard of 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 persuaded that defendant has demonstrated that the WCJ's finding that applicant is entitled to a replacement QME panel will cause it substantial prejudice or irreparable harm for which reconsideration will not provide an adequate remedy.

A. Rules Pertaining to the QME Evaluation and Request for a Replacement QME Panel

The statutory timeframe for completion and submission of the initial QME medical evaluation "shall be no more than 30 days after the evaluator has seen the employee or otherwise commenced the medical evaluation procedure." (Lab. Code, § 139.2(j)(1)(A).)

Section 4062.5 states: "If a qualified medical evaluator selected from a panel fails to complete the formal medical evaluation within the timeframes established by the administrative director pursuant to paragraph (1) of subdivision (j) of Section 139.2, a new evaluation may be obtained upon the request of either party, as provided in Sections 4062.1 or 4062.2." (Lab. Code, § 4062.5.)

AD Rule 38(b) provides, "If an evaluator fails to prepare and serve the initial or follow-up comprehensive medical-legal evaluation report within thirty (30) days ..., the employee or the employer may request a QME replacement...." (Cal. Code Regs., tit. 8, § 38(b).) AD Rule 31.5(a)(12) permits a replacement QME panel to be issued at a party's request, and states:

> (a) A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs:....

> (12) The evaluator failed to meet the deadlines specified in Labor Code section 4062.5 and section 38 (Medical Evaluation Time Frames) of Title 8 of the California Code of Regulations and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report. A party requesting a replacement on this ground shall attach to the request for a replacement a copy of the party's objection to the untimely report.

(Cal. Code Regs., tit. 8, § 31.5(a)(12).)

Here, the issue is whether Dr. Levine's QME report was timely served upon applicant in accordance with the aforementioned rules. It is undisputed that Dr. Levine evaluated applicant on May 25, 2023. Pursuant to AD Rule 38(b), Dr. Levine had thirty (30) days from May 25, 2023, or until June 24, 2023, to serve the QME report. However, June 24, 2023 was a Saturday; as a result, Dr. Levine had until Monday, June 26, 2023 to timely serve the QME report. (Cal. Code Regs., tit. 8, § 10600(b).) The proof of service attached to the QME report states that the report was mailed by Dr. Levine's office to applicant's attorney's office via U.S. mail on June 22, 2023, which was within the 30-day deadline. (Def. Exh. A.)

However, in the request for a replacement panel, applicant's attorney claimed that the QME report was not served until July 18, 2023 via email from defendant's attorney, and that she had objected to the report for lateness in an email to defendant's attorney on July 13, 2023. These emails were attached to the replacement panel request. (App. Ex. 1, pp. 1-2, 42.)

As noted above, the WCJ found that applicant established that initial service was made by defendant's attorney on or about July 18, 2023, and that applicant had objected prior to receipt. The WCJ further found that defendant was required to verify the QME's June 22, 2023 proof of service by "affirmative evidence," namely, testimony or declaration, in order to refute applicant's claim. Because defendant did not produce such evidence, the WCJ accepted applicant's claim of untimeliness and ordered the Medical Unit to issue a replacement QME panel. (F&O, pp. 1-2.)

The WCJ's findings regarding the date of service of the QME report raise the so-called "mailbox rule." Under the mailbox rule, "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) This rule is well established. (See *Hagner v. United States* (1932) 285 U.S. 427, 430 ["[t]he rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was

addressed."].) Application of this rule was also discussed in an en banc decision by the Appeals Board:

> The presumption that a letter mailed was received is rebuttable. (*People v. Smith* (2004) 32 Cal.4th 792, 799, 11 Cal. Rptr. 3d 290, 86 P.3d 348.) However, the trier of fact is obligated to "assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence." (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421, 100 Cal. Rptr. 2d 818.) A mere allegation that the recipient did not receive the mailed document has been found to be insufficient to rebut the presumption. (See *Alvarado v. Workmen's Comp. Appeals Bd.* (1970) 35 Cal.Comp.Cases 370 (writ den.) and *Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460 (writ den.).) If the sending party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce "believable contrary evidence" that it was not received. (*Craig, supra*, at pp. 421-422, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12, 113 Cal. Rptr. 790.) Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received." (*Id.*)

(*Suon v. California Dairies* (*Suon*) (2018) 83 Cal.Comp.Cases 1803, 1817 (Appeals Board en banc).)

Upon review, we conclude that the WCJ's finding that the QME report was first served on or about July 18, 2023 is not supported by the mailbox rule as discussed in *Suon, supra*.

First, defendant produced evidence that Dr. Levine's office served the QME report on applicant's attorney's law office on June 22, 2023. Said evidence consists of the proof of service attached to the QME report, which was signed by Dr. Levine's employee attesting to service of the report. The proof of service shows that the report was sent via U.S. mail on June 22, 2023, and it is not disputed that the mailing address listed for applicant's attorney was the correct address. (Def. Exh. A, p. 37.)[2] Pursuant to Evidence Code section 641, the QME report is therefore presumed to have been received by applicant's attorney in the ordinary course of mail on June 22, 2023. (Evid. Code, § 641.) The burden then shifted to applicant to produce believable contrary evidence that the QME report was not served on that date.

As discussed in *Suon*, a "mere allegation" that a mailed document was not received has been found insufficient to rebut the mailing presumption. Here, the record contains more than an allegation by applicant's attorney in the form of two emails between opposing counsel, wherein

---

[2] The mailing address listed for applicant's attorney in the QME's proof of service (Def. Exh. A, p. 37) matches the mailing address listed in applicant's request for the replacement panel. (App. Exh. 1, p. 1.)

applicant's attorney objected to the QME report for untimeliness on July 13, 2023, and defendant's attorney provided applicant's attorney with the QME report on July 18, 2023. (App. Exh. 1, pp. 2, 42.) As a result, it was the WCJ's responsibility to weigh this evidence to determine whether applicant satisfied its burden to rebut the inference of receipt established by defendant. Yet, rather than simply weigh this evidence, the WCJ shifted the evidentiary burden *back* to defendant to provide *additional* evidence to support the mailing presumption that it had already established using the QME's proof of service. Under *Suon*, this is erroneous and unnecessary; once the service presumption is established, the burden shifts only once, to the party alleging non-receipt, who must rebut the service presumption (or not).

In weighing the evidence pursuant to *Suon*, we conclude that the emails presented by applicant do not constitute sufficient evidence to overcome the service presumption established by defendant through the properly addressed, signed proof of service from the QME's office dated June 22, 2023. The simple fact that defendant's attorney *also* provided applicant's attorney with the QME report does not in any way show that the QME's office did not serve the report in a timely manner.

In summary, defendant successfully established the presumption that the QME report was served within the requisite 30-day deadline, and applicant failed to provide sufficient evidence in rebuttal. Accordingly, the evidence shows that the QME report was timely issued per AD Rule 38(b) and section 4602.5. Thus, applicant was not entitled to a replacement QME panel under AD Rule 31.5(a)(12).

Based on the foregoing, we grant defendant's Petition as one seeking reconsideration and amend the F&O to find that applicant is not entitled to a replacement QME panel (Finding of Fact No. 9). Applicant's request for a replacement QME panel is ordered denied. We also rescind the Findings of Fact discussing untimeliness of the QME's report and applicant's objection thereto (Finding of Fact Nos. 7-8).

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued by the WCJ on February 16, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on February 16, 2024 is **AFFIRMED** except that it is **AMENDED**, as follows:

FINDINGS OF FACT

1. It is found Laurie Nash, while employed on October 2, 2021, as a licensed vocational nurse at Lake Forest, California by the B2B Staffing Services, sustained injury arising out of and in the course of employment to her cervical spine, shoulders, left ankle and left knee.

2. At the time of the injury, the employer was insured for work-related injuries the Nova Casualty Company, administered by Sedgwick Claims Management.

3. The employer has furnished some medical treatment.

4. The PQME is Martin Levine, M.D.

5. It is found Martin Levine, M.D. in the capacity of a PQME authored a medical report pursuant to his evaluation on May 25, 2023.

6. That as part of that report, there was a proof of service signed by an employee of the PQME attesting to the service of the medical report on June 22, 2023.

7. Applicant is not entitled to a replacement panel under AD Rule 31.5(a)(12).

ORDER

IT IS ORDERED that applicant's request for a replacement panel is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 13, 2024

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

LAURIE NASH
GHITTERMAN, GHITTERMAN & FELD
ALBERT & MACKENZIE
EMPLOYMENT DEVELOPMENT DEPARTMENT

AH/*cs*

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