WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

PAULA RAMIREZ, *Applicant*

vs.

AVALON COLD STORAGE LLC; SUNZ INSURANCE COMPANY, administered by NEXT LEVEL, *Defendants*

Adjudication Number: ADJ18205051
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks removal of the Findings and Order (F&O) issued on April 16, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a warehouse laborer during the period January 1, 2006 through July 28, 2023, applicant claims to have sustained injury arising out of and occurring in the course of employment in the form of stress, anxiety, insomnia, and hypertension, and to the shoulders, arms, hands, wrists, fingers, psyche, neck, legs, knees, ankles, feet, chest, and respiratory system; (2) panel number 7629463 was not prematurely obtained by applicant; and (3) applicant failed to comply with AD Rule 30(b)(1)(C).

The WCJ ordered that QME panel number 7629463 is invalid.

Applicant contends that the record shows no failure to comply with AD Rule 30(b)(1)(C) and that the WCJ was without authority to invalidate panel number 7629463.

We did not receive an Answer.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will treat the Petition as one for reconsideration and deny reconsideration.

FACTUAL BACKGROUND

In the Report, the WCJ states:

Applicant requested a Panel QME in the field of Pain Medicine on 10/16/23. The Medical Unit issued panel list #7629463 on 10/17/23. **Applicant's Exhibit 1**. Defendant filed a Petition to Strike the panel based on *Cal. Code of Reg.* §10605(a) and that Applicant violated *Cal. Code of Reg.* §30(b)(1)(C) on 11/6/23. **Defendant's Exhibit A**. Defendant filed a Declaration of Readiness on this issue the following day.

Applicant filed an Objection to the Petition to Strike on 11/9/23 arguing it did notprematurely request the panel and it did not violate *Cal. Code of Reg*. §30(b)(1)(C) because it attached the necessary documents to the panel. **Applicant's Objection to Defendant's Petition to Strike, EAMS Doc ID 49018124.**

At the 1/17/24 Mandatory Settlement Conference (MSC), the parties set the matter for trial on the issue of Defendant's Petition to Strike, which was held on March 12, 2024. On April 16, 2024, the WCJ issued a Findings of Fact and Order that Applicant did not prematurely obtain the panel, however, she failed to comply with *Cal. Code of Reg*. §30(b)(1)(C) and therefore panel #7629463 was invalid. It is from these Findings and Order that Applicant petitions for Removal.

. . .

Applicant asserts the court erred in finding that Applicant failed to comply with *Cal. Code of Reg*. §30(b)(1)(C) because Applicant did serve the supporting documentation to the panel list. Applicant argues that it is "common practice" for parties to include various documents or attachments to a particular document, in this case Panel #7629463, and not name those additional documents or attachments in the proof of service.

Cal Code of Reg. §10625(c) states "'Proof of service' means a dated and verified declaration identifying the document(s) served and the parties who were served, and stating that service has been made and the method by which it has been made." The code is clear in that the proof of service must "identify" the documents served. In this case, the proof of service shows Applicant served defendant with the QME panel list. **Applicant's Exhibit 1**. There is no proof that Applicant served the additional required documents. Applicant's understanding that it is "part and parcel of the panel" is flawed. Each document must be listed on the proof of service. Contrary to Applicant's argument, Defendant does not need to present evidence it had suffered prejudice by Applicant's failure to serve the additional documents required by the law.

Applicant also asserts the court's decision to invalidate the panel is "excessive" and lacks legal authority. In *Pizano v. Azusa Unified School District*, 2016 Cal. Wrk. Comp. P.D. LEXIS 439, the court opined that failure to serve the required documents, or at least establish proof of service, may allow the appeals board to invalidate the panel. In *Silva v. Inter-Con Security Systems, Inc*., 2024 Cal. Wrk.

Comp. P.D. LEXIS 24, the WCAB explained that if a party has failed to comply with the rules for service of panel QME requests *and* omitted the required documents, the panel was not properly procured and, therefore, was invalid.

Lastly, Applicant is at a loss of how to proceed with the discovery process. While failure to serve the panel request as mandated under *Cal. Code of Reg*. §30 is not listed as a specific basis for vacating a panel request or issuing a new panel, the Board does have plenary power over its discovery processes. Nothing precludes the applicant from again requesting a panel, provided that applicant complies with *Cal. Code of Reg*. §30. Applicant is free to request a panel using the proper procedures, therefore Applicant failed to show how this is an instance of substantial prejudice or irreparable harm.
(Report, pp. 1-4.)

DISCUSSION

Preliminarily, we observe that 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 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, i.e., while employed as a warehouse laborer during the period January 1, 2006 through July 28, 2023, applicant claims to have sustained injury arising out of and occurring in the course of employment

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

in the form of stress, anxiety, insomnia, and hypertension, and to the shoulders, arms, hands, wrists, fingers, psyche, neck, legs, knees, ankles, feet, chest, and respiratory system. It follows that the WCJ's decision is a final order subject to reconsideration; and since the Petition only challenges the interlocutory finding that applicant failed to comply with AD Rule 30(b)(1)(C) and the interlocutory order that panel number 7629463 is invalid, the removal standard applies to our evaluation of its merits. (See *Gaona*, *supra*.)

Turning to the merits of the Petition, we observe that 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; see also *Cortez*, *supra*; *Kleemann*, *supra*.) In addition, 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.)

Applicant first contends that the record shows no failure to comply with AD Rule 30(b)(1)(C).

AD Rule 30 provides that when a represented party requests a QME panel:

> (b) … requests for an initial QME panel in a represented case, for all cases with a date of injury on or after January 1, 2005, shall be submitted electronically utilizing the Division of Workers' Compensation internet site. …
> (1) The party requesting a QME panel online shall:
> * * *
> (C) Print and serve a paper copy of the online request, the panel list, and a copy of any supporting documentation that was submitted online, upon the opposing party with a proof of service, within 1 (one) working day after generating the QME panel list. Within 10 (ten) days of service of the panel, each party may strike one name from the panel.
> (Cal. Code Regs., tit. 8, § 30(b)(1)(C).)

Here, the proof of service shows that applicant served the QME panel list but does not show that she also served the other documents required by AD Rule 30(b)(1)(C); namely, a paper copy of the online panel request and any supporting documentation. Additionally, the pleadings record lacks an amended proof of service which could establish applicant's contention that she did in fact serve a copy of the panel request and the supporting documentation upon defendant.

Accordingly, we conclude that the record supports the finding that applicant failed to comply with AD Rule 30(b)(1)(C).

Applicant further contends that the WCJ was without authority to invalidate panel number 7629463.

In *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Bd. en banc), the Appeals Board opined that where the Labor Code does not provide a specific remedy for certain violations of the rules applicable to the QME process, the trier of fact has wide discretion to determine the appropriate remedy. (See *Suon*, *supra*, at p. 1815.)

Here, the order invalidating panel number 7629463 does not exceed the wide discretion afforded the WCJ to determine an appropriate remedy. In particular, the order does not cause applicant significant prejudice or irreparable harm because she remains "free to request a panel using the proper procedures" and may do so without undue delay in the proceedings. (Report, p. 4.) Accordingly, we conclude that the order invalidating panel number 7629463 was within the WCJ's authority.

Accordingly, we will treat the Petition as one for reconsideration and deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on April 16, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 17, 2024

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

PAULA RAMIREZ
LAW OFFICES OF JAMES YANG
EMPLOYER DEFENSE GROUP

SRO/*cs*

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