WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LOURDES AVILA, *Applicant*

vs.

PRIORITY WORKFORCE; MVP PAYROLL FINANCING, LLC lcf PRIORITY BUSINESS SERVICES, INC. (VENSURE); SUNZ INSURANCE COMPANY, administered by NEXT LEVEL ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ19417386
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR REMOVAL

Defendant has filed a Petition for Removal of the Findings and Orders issued by a workers' compensation administrative law judge (WCJ) on September 9, 2024, in which the WCJ found that due to an irreparable ambiguity regarding panel strikes of the parties, a new panel is appropriate to replace existing panel number 7709310. The WCJ ordered the medical director of the division of workers' compensation (DWC) to issue a replacement panel, and further ordered that the next set of strikes by the parties as to that replacement panel occur via email to avoid a duplicate strike.

Petitioner contends that the WCJ's Order replacing panel 7709310 without opening the record and allowing the parties to be heard violated their due process rights. Petitioner further asserts that based upon the applicant's initial strike being first based upon the mailbox rule, defendant, and not applicant, was entitled to another strike when they became aware that they and applicant had initially struck the same evaluator.

Applicant did not file an Answer to the Petition. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending removal be denied.

We have reviewed the record of proceedings in this matter, the allegations in the Petition for Removal as well as the contents of the Report. Based on WCJ's analysis of the merits of the

petitioner's arguments in the WCJ's report, and for the reasons set forth below, we will deny the petition for removal.

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 substantial 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, for the reasons stated in the WCJ's report, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

Petitioner refers to our en banc case of *Messele v. Pitco Foods, Inc.*(2011) 76 Cal.Comp.Cases 956, for the proposition that the mailbox rule controls the time to commence the strike process, and that since applicant was first in line to strike qualified medical evaluator (QME) Luigi Galloni, M.D., defendant was entitled an additional strike, as their initial strike of Dr. Galloni was *void ab initio* when they discovered they had issued a strike of the same evaluator as applicant.

Messele addressed the time limit upon which the parties may seek agreement to utilize an agreed medical evaluator (AME) as provided under Labor Code[1] section 4062(b). Here, the applicable section is section 4062.2(c).

In our panel decision of *Alvarado v. WCAB* (2007) 72 Cal.Comp.Cases 1142, which was discussed and distinguished in *Messele*, we found that the ten (10) day time limit prescribed by section 4062.2(c) for each party to strike a physician from a qualified medical evaluator (QME) panel runs from the date of assignment of the three-member panel, not from service of the panel on parties, and is not extended by Code of Civil Procedure section 1013.

The stipulated facts as confirmed by defendant in their petition, and as set forth in the Minutes of Hearing (MOH) of September 9, 2024, state that panel number 7709310 in the field of orthopedics issued on July 3, 2024. On July 9, 2024 applicant struck Luigi Galloni, M.D. from the panel. On July 11, 2024 defendant struck Dr. Galloni as well, unaware of the applicant's strike.

[1] All further references are to the Labor Code, unless otherwise stated.

On July 12, 2024, defendant became aware of Luigi Galloni, M.D.'s strike by applicant's attorney. On July 18, 2024[2], defendant struck Mohammed Sirjullah, M.D. from the panel. Also on July 18, 2024, applicant issued a second strike of evaluator Elliot Gross, M.D. from the panel.

Thus, defendant's subsequent strike of Mohammad Sirajullah, M.D., which occurred on July 18, 2024, was untimely, and applicant was thereafter entitled to set an appointment with one of the remaining panel members. As defendant stipulates that they became aware of both parties striking Luigi Galloni, M.D. on July 11, 2024, it is unclear why they waited until July 18, 2024 to strike Dr. Sirajullah, as they still had up to and through July 15, 2024 to do so. The ten (10) day limit for each party to strike an evaluator fell on July 13, 2024, a Saturday.[3]

Further, in *Alvarado*, we similarly denied removal on the basis that defendant has failed to show they would suffer substantial prejudice or irreparable harm as a result of the WCJ's finding that the appropriate remedy was to order a replacement panel.

Thus, due to the unusual facts presented wherein each party initially struck the same physician and the subsequent panel strikes, which were both untimely, occurred on the same date, we discern no good cause upon which to overturn the finding and rationale of the WCJ in ordering a replacement panel. Further, petitioner has failed to show that substantial prejudice or irreparable harm will occur by the issuance of a new panel of evaluators, as no evaluation has yet taken place.

Petitioner further contends their due process rights have been violated. We note, however, that the issue in dispute solely involves an analysis regarding the timeliness of actions, for which the parties stipulated as to the relevant dates. As such, we find that petitioner's due process rights have not been violated. The order to obtain a replacement panel fails to determination any substantive rights of the parties at this time.

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[2] Per the MOH of the WCJ, both applicant and defendant's second strikes occurred on July 19, 2024, but using petitioner's stated dates, as well as the filed correspondence relative to the strikes (EAMS Doc. I.D.s 53762303 and 53762304.), the date for both strikes appears to be July 18, 2024. In any event, the result is still the same relative to the timeliness issue.

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, 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 offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Findings and Order of the workers' compensation administrative law judge replacing panel 7709310 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

March 17, 2025

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

AVILA LOURDES
COOPER BROWN
LAW OFFICES OF ALI ASHKAN AZARAKHSH

LAS/*pm*

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