

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 **CARLOS CABRERA RAZO,**

5 *Applicant,*

6
7 *vs.*

8 **LAS POSAS COUNTRY CLUB; HARTFORD**
9 **INSURANCE CO., Administered by**
10 **GALLAGHER BASSETT,**

11 *Defendants.*

Case No. ADJ8381652
(Oxnard District Office)

OPINION AND DECISION
AFTER RECONSIDERATION
VACATING GRANT OF
RECONSIDERATION,
DISMISSING PETITION FOR
RECONSIDERATION, AND DENYING
PETITION FOR REMOVAL

12 On August 12, 2013, the Appeals Board granted reconsideration to further study the factual and
13 legal issues. This is our Decision After Reconsideration.

14 In the Findings and Order of May 28, 2013, the workers' compensation judge (WCJ) found, in
15 relevant part, that applicant timely exercised his right to strike members from the replacement Qualified
16 Medical Evaluator (QME) internal medicine and orthopedic panels assigned on January 3, 2013. The
17 WCJ ordered the parties to proceed with QMEs with the remaining internal medicine panel member and
18 the remaining orthopedic panel member from the January 3, 2013 panels.

19 Defendant filed a Petition for Reconsideration and a Petition for Removal. In both petitions,
20 defendant contended that effective January 1, 2013, Labor Code section 4062.2(c), as amended by Senate
21 Bill (SB) 863, applies to all dates of injury, that the amended statute applies in this case, and that
22 defendant's QME choices should prevail because it properly designated physicians from the panels in
23 orthopedic and internal medicine.

24 The WCJ submitted a Report and Recommendation on defendant's petitions.

25 The Board did not receive an answer from applicant.

26 For the reasons discussed below we will in effect affirm the WCJ's decision of May 28, 2013.

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1 **REMOVAL IS THE APPROPRIATE REMEDY**

2 At the outset, we observe that because the WCJ's decision did not determine any substantive
3 rights or liabilities of the parties, it was not a "final order, decision, or award" within the meaning of
4 Labor Code sections 5900 and 5903. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th
5 1068 [65 Cal.Comp.Cases 650]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980)
6 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals*
7 *Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].)

8 In this case, defendant filed both a Petition for Reconsideration and a Petition for Removal, but
9 the petition for reconsideration should have been dismissed because removal provides the appropriate
10 remedy for a non-final order. (Lab. Code, § 5310; Cal. Code Regs., tit. 8, § 10843.) Accordingly, we
11 will vacate our August 12, 2013 Opinion and Order Granting Reconsideration and dismiss defendant's
12 Petition for Reconsideration.

13 We turn to the merits of defendant's Petition for Removal.

14 **BACKGROUND**

15 Applicant submitted a claim alleging that while employed as a driver by Las Posas Country Club
16 during the period May 7, 2011 through May 7, 2012, he sustained a cumulative trauma (CT) injury to his
17 psyche, sleep disorder, head, eyes, back, digestive system, hernia, knee, hands and head.

18 After defendant denied the claim, a dispute arose over the panel QME selection process. The
19 dispute was tried before the WCJ on March 7, 2012. The parties stipulated to the following factual
20 chronology.

21 In the field of internal medicine, an original panel of QMEs initially issued on October 18, 2012.
22 A replacement panel was ordered on November 30, 2012. The replacement panel issued on January 3,
23 2013. On January 11, 2013, defendant exercised its right to strike a member of the panel. On January
24 14, 2013, defendant designated one of the other panel members to be the QME. On January 15, 2013,
25 applicant exercised his right to strike a member of the panel.

26 In the field of orthopedics, an original panel of QMEs initially issued on October 18, 2012. A
27 replacement panel was ordered on November 13, 2012. The replacement panel issued on January 3,

1 2013. On January 11, 2013, defendant exercised its right to strike a member of the panel. On January
2 14, 2013, defendant designated one of the other panel members to be the QME. On January 15, 2013,
3 applicant exercised his right to strike a member of the panel.

4 The parties further stipulated that all dates with respect to the issuance of the QME panels reflect
5 the dates that were written on the panel forms sent to the parties, and not the receipt dates.

6 Finally, the parties stipulated that the WCJ was to decide the issues of whether applicant timely
7 exercised the right to strike a member of the panel pursuant to Labor Code section 4062.2(c), and
8 “whether that code section in its 2012 version or...in its 2013 version is applicable[.]”

9 In the May 28, 2013 Findings and Order, the WCJ found that applicant timely exercised his right
10 to strike members from replacement QME internal medicine and orthopedic panels assigned on January
11 3, 2013. The WCJ applied former section 4062.2(c), which provided in relevant part:

12 “Within 10 days of assignment of the panel by the administrative director,
13 the parties shall confer and attempt to agree upon an [AME] selected from
14 the panel. If the parties have not agreed on a medical evaluator from the
15 panel by the 10th day after assignment of the panel, each party may then
16 strike one name from the panel. The remaining [QME] shall serve as the
17 medical evaluator. If a party fails to exercise the right to strike a name
18 from the panel within three working days of gaining the right to do so, the
19 other party may select any physician who remains on the panel to serve as
20 the medical evaluator. [...]”

21 In his Opinion on Decision, the WCJ explained that to make a timely strike, applicant had 10 days
22 after assignment of the QME panel on January 3, 2013 plus “three working days,” i.e., until January 16,
23 2013. Since applicant made his strike on January 15, 2013, it was timely.

24 We agree with the WCJ that applicant’s strike was timely. However, we disagree that former
25 section 4062.2 applies. Instead, we apply section 4062.2 as amended by SB 863.

26 DISCUSSION

27 By its enactment of SB 863 in 2012, the Legislature amended Labor Code section 4062.2(c) to
state as follows:

“Within 10 days of assignment of the panel by the administrative director,
each party may strike one name from the panel. The remaining qualified
medical evaluator shall serve as the medical evaluator. If a party fails to
exercise the right to strike a name from the panel within 10 days of

1 assignment of the panel by the administrative director, the other party may
2 select any physician who remains on the panel to serve as the medical
3 evaluator. The administrative director may prescribe the form, the
manner, or both, by which the parties shall conduct the selection process.”

4 The statute, as amended, became effective January 1, 2013. However, section 84 of SB 863
5 states: “This act shall apply to all pending matters, regardless of date of injury, unless otherwise
6 specified in this act, but shall not be a basis to rescind, alter, amend, or reopen any final award of
7 workers' compensation benefits.” (Stats. 2012, ch 363, § 84.)

8 “Where a law makes changes relating to remedies or modes of procedure, rather than substance,
9 the law applies to existing causes of action and defenses without having retrospective effect.” (*Sierra*
10 *Pacific Industries v. Workers' Comp. Appeals Bd. (Chatham)* (2006) 140 Cal.App.4th 1498, 1506 [71
11 Cal.Comp.Cases 714, 718].)

12 The reason for this rule is that “procedural statutes may become operative only when and if the
13 procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future
14 regardless of the time of occurrence of the events giving rise to the cause of action. In such cases the
15 statutory changes are said to apply not because they constitute an exception to the rule...of statutory
16 construction, but because they are not in fact retrospective. There is then no problem as to whether the
17 Legislature intended the changes to operate retroactively.” (*Ibid.*, quoting *Aetna Cas. & Surety Co. v.*
18 *Ind. Acc. Com.* (1947) 30 Cal.2d 388, 394 [12 Cal.Comp.Cases 123, 126], citations omitted.)

19 Because section 4062.2 governs the panel QME process, it is a procedural statute. Therefore, its
20 application in this case is prospective, not retroactive.

21 Furthermore, the Legislature expressed its intent in section 84 that SB 863 “shall apply to all
22 pending matters, regardless of date of injury, unless otherwise specified in this act, but shall not be a
23 basis to rescind, alter, amend, or reopen any final award[.]” The Legislature did not “otherwise specify”
24 that section 4062.2 should not be applied “to all pending matters, regardless of date of injury,” and there
25 is no final award in this case.

26 Consistent with section 84, we hold that section 4062.2, as amended by SB 863, applies to the
27 Administrative Director’s January 3, 2013 assignment of the QME panels in this case.

1 We also hold, pursuant to the discussion of Code of Civil Procedure (CCP) 1013 in *Messele v.*
2 *Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc) ("*Messele*"), that section
3 4062.2(c) allows a party ten days from the Administrative Director's assignment of a QME panel, plus
4 five days for U.S. mail, to strike a name from the QME panel.

5 In *Messele*, the Board held that when the first written AME proposal is "made" by mail or by any
6 method other than personal service, the period for seeking agreement on an AME under former Labor
7 Code section 4062.2(b) is extended five calendar days if the physical address of the party being served
8 with the first written proposal is within California.

9 Thus we construe the phrase in amended section 4062.2(c), "assignment of the panel by the
10 Administrative Director," to mean not only assignment but also service of the names of the panel QMEs
11 on the parties by U.S. mail. This construction accords with common sense and practical effect, as mere
12 "assignment" of the panel will not provide the parties with notice of the names and the related right to
13 strike or forgo striking a name. Moreover, the moment when the AD "assigns" the panel of QMEs is
14 analogous to the moment when the first written AME proposal is "made" by mail, as contemplated by
15 *Messele*. As just noted, the assignment of a panel absent communication of the assignment to the parties
16 would be insufficient to notify the parties that their right to strike has been triggered. Therefore,
17 assignment must be construed to also include service by U.S. mail from the Medical Unit of the
18 Administrative Director.

19 In *Messele*, the Board also stated that "[p]ursuant to Labor Code sections 5708 and 5316, the
20 WCAB's Rules govern service if they differ from CCP section 1013. Because current Rule 10507
21 provides a five calendar day extension for service by mail, fax, e-mail, or any method other than personal
22 service, its provisions are no longer identical to CCP section 1013; and Rule 10507 is, therefore, the
23 controlling authority." (*Messele, supra*, 76 Cal.Comp.Cases at 965.)

24 This case concerns operation of amended section 4062.2(c), not former section 4062.2(b)
25 discussed in *Messele*. More importantly, *Messele* involved the time limit for parties to make and
26 communicate written AME proposals to one another in WCAB proceedings, whereas this case involves
27 the time limit for a party to strike a QME name after assignment of the panel by the *Administrative*

1 *Director.* In assigning panels the Administrative Director is not necessarily bound by WCAB Rule
2 10507, and it appears there is no Administrative Director Rule governing assignment and mailing of the
3 panels. Therefore we find that CCP 1013(a) is controlling, and it adds five days to the time within which
4 a party may strike a panel QME name after the Administrative Director “assigns” the panel. The same
5 result is reached even if Rule 10507 applies.

6 We are aware that in *Alvarado v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1142
7 (writ den.) the Board panel found CCP section 1013 inapplicable to extend the time for a party to strike a
8 physician’s name from a QME panel because the operative trigger for the time period was not service,
9 but assignment of the panel. The Board stated that “the time limits prescribed by Labor Code §
10 4062.2(c) run from the date of assignment of the three-member panel, not from service of the panel.” (72
11 Cal.Comp.Cases at p. 1145.)

12 In light of the Legislature’s subsequent amendment of section 4062.2(c), we disagree.

13 First, *Alvarado* is distinguishable because it involved application of former section 4062.2, which
14 allowed the parties 10 days to agree on one of the QMEs in the assigned panel, and which gave the
15 parties a right to strike a name from the panel “within three working days of gaining the right to do so[.]”
16 However, amended section 4062.2(c) no longer includes language affording a party the right to agree to a
17 panel QME or to strike a name within three working days. Instead, the statute now provides that each
18 party has 10 days from assignment of the panel and, as construed here, an additional five calendar days
19 for service of the assignment by U.S. mail.

20 Thus, although we adopt the *Messele* principle to extend by five calendar days the ten-day period
21 within which a party may strike one name after assignment of the panel by the Administrative Director,
22 *Messele* involved former section 4062.2(b), whereas this case and *Alvarado* involve section 4062.2(c).
23 To reiterate, we disagree with *Alvarado*’s reasoning that “assignment” alone triggers a party’s right to
24 strike a name. As previously discussed, the right to strike a name would be meaningless unless the
25 identity of the panel QMEs is communicated to parties by the Administrative Director via U.S. mail.
26 Pursuant to CCP 1013(a), when a party has a time limit to respond to a document received by U.S. mail,
27 five calendar days is added so that a party has a total of 15 days after assignment to strike a name from

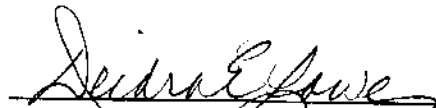
1 the QME panel.

2 In this case, which involves a 2012 date of injury and a QME panel assigned January 3, 2013,
3 applicant's strike on the 12th day was within 15 days after assignment by the Administrative Director.
4 Therefore, the strike was timely, and we will deny defendant's Petition for Removal.

5 For the foregoing reasons,

6 **IT IS ORDERED**, as the Appeals Board's Decision After Reconsideration, that the Board's
7 Opinion and Order Granting Reconsideration of August 12, 2013 is **VACATED**, that defendant's
8 Petition for Reconsideration of the Findings and Order issued by the WCJ on May 28, 2013 is
9 **DISMISSED**, and that defendant's Petition for Removal is **DENIED**.

10 **WORKERS' COMPENSATION APPEALS BOARD**

11 
12 _____
13 **DEIDRA E. LOWE**

14 I CONCUR,

15 
16 _____
17 **RONNIE G. CAPLANE**

18 
19 _____
20 **DEPUTY**
RICK DIETRICH



21 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

22 **FEB 07 2014**

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

25 **CARLOS CABRERA RAZO**
26 **GRANCELL, STANDER, REUBENS, THOMAS AND KINSEY**
REYES & BARSOUM

27 **JTL/ara/bea**

CABRERA RAZO, Carlos