WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOANN MATUTE, ***Applicant,*** **vs.** **LOS ANGELES UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,** ***Defendants.***	**Case No. ADJ984305 (LBO 0377754)** **(Los Angeles District Office)** **OPINION AND DECISION AFTER RECONSIDERATION** **(En Banc)**

An Appeals Board panel previously granted applicant's Petition for Reconsideration to further study the factual and legal issues. Thereafter, to secure uniformity of decision in the future, the Chairwoman 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 decision. (Lab. Code, § 115.)[1]

On February 20, 2015, a workers' compensation administrative law judge (WCJ) issued a Findings and Order wherein she dismissed as untimely applicant's appeal of an Independent Medical Review (IMR) determination issued on November 6, 2014. The WCJ found that a five (5) day extension for service by mail pursuant to Code of Civil Procedure [C.C.P.] section 1013(a) did not apply to applicant's IMR appeal because the prescribed time period in Labor Code section 4610.6(h)[2] is commenced by the "mailing" of the Administrative Director's[3] determination and not by "service."

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[1] 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]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236]; see also Gov. Code, § 11425.60(b).) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

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

[3] " 'Administrative [D]irector' means the Director of the Division of Workers' Compensation." (§ 3206.)

Applicant contends that the IMR appeal was timely because the time to file an IMR appeal runs from the "mailing" of the IMR determination under section 4610(h) and from the "service by mail" of the IMR determination under WCAB Rule 10957.1(c); that there is no legal difference between "mailing" and "service by mail"; and that therefore, C.C.P. section 1013(a) extends the 30-day period to file an IMR appeal under section 4610(h) and WCAB Rule 10957.1(c) by five days. (Cal. Code Regs., tit. 8, § 10957.1(c).)[4]

Based upon our review of the relevant statutes and case law, we hold that:

(1) The term "mailing" contained in section 4610.6(h) is equivalent to and means "service by mail";

(2) The 30-day period to file a timely appeal from an IMR determination under section 4610.6(h) is extended by five days pursuant to the provisions of section 5316 and C.C.P. section 1013(a).

As our decision after reconsideration (en banc), we find that applicant's IMR appeal was timely, and therefore rescind the Findings and Order and return the matter to the trial level so that the WCJ may consider the merits of applicant's IMR appeal.[5]

BACKGROUND

Applicant claimed cumulative industrial injury to her psyche, fibromyalgia, carpal tunnel syndrome, allergies and rheumatoid arthritis while employed as a teacher for defendant during the period from September 1985 to February 23, 2006. The case was settled pursuant to Stipulations with Request for Award on July 31, 2012. Applicant was awarded 37% permanent disability and future medical treatment for rheumatoid arthritis, fibromyalgia and psychiatric injuries.

On July 7, 2014, Pamela Stitt, M.D., issued a prescription for 24-hour home health care services. (App. Exh. 3, 24-Hour Home Care Prescription, July 7, 2014.) Dr. Stitt noted that applicant suffered from chronic medical conditions including post-lumbar laminectomy, osteoarthritis and fibromyalgia that

[4] Unless otherwise stated, all further references to rules are to California Code of Regulations, title 8, section 13000 and following.

[5] Commissioner Brass is unavailable and did not participate in this en banc decision.

decreased her musculoskeletal strength, flexibility and maneuverability and caused chronic pain. (*Id.*) On August 18, 2014, a Request for Authorization for the services was submitted to defendant, and on August 22, 2014, defendant conducted Utilization Review (UR).[6] (See Def. Exh. B, Utilization Review, August 23, 2014.) On August 23, 2014, defendant served applicant with a letter finding that the requested services were not medically necessary. (Def. Exh. B, UR, August 23, 2014.)

On September 4, 2014, applicant filed a request for IMR. (App. Exh. 5, IMR Application & Supporting Documents, September 4, 2014.) On November 6, 2014, the Administrative Director, through her agent Maximus Federal Services, Inc., issued a Final Determination Letter upholding the UR denial. (Joint Exh. 2, IMR Final Determination Letter, November 6, 2014.) On December 10, 2014, applicant filed an appeal of the IMR determination.[7]

December 10, 2014 is 34 days after the November 6, 2014 date of the Final Determination Letter.

Applicant's IMR appeal was heard by the WCJ on February 19, 2015. On February 20, 2015, the WCJ issued the Findings and Order dismissing the IMR appeal as untimely.

DISCUSSION

I. The Term "Mailing" Contained in Section 4610.6(h) Is Equivalent to and Means "Service By Mail."

Procedures relating to independent medical review of UR determinations are governed by section 4610.6 and WCAB Rule 10957.1. An IMR determination must be made in writing. (§ 4610.6(d).) The written IMR determination must be provided to the employee and the employer. (§ 4610.6(f).) An IMR

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[6] When an employee seeks medical treatment, the employee's primary treating physician must prepare a form "Request for Authorization" describing the treatment and send it to the employer for submission to utilization review. (§ 4610; §§ 9785.5; 9792.6 – 9792.10.1.) Section 4610(a) defines "utilization review" as "functions that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians. . ." (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981].)

[7] Disputes over UR decisions are submitted to the Administrative Director for assignment to IMR. (§§ 4610.5, 4610.6; Cal. Code Regs., tit. 8, §§ 9792.10.2 – 9792.10.7.) "The determination of the independent medical review organization shall be deemed to be the determination of the [A]dministrative [D]irector and shall be binding on all parties." (§ 4610.6(g).) Thereafter, an appeal of a determination may only be filed with the WCAB on limited grounds as specified in section 4610.6(h). (See § 10957.1.)

appeal must be filed "…within 30 days of the date of *mailing* of the determination to the aggrieved employee or the aggrieved employer." (§ 4610.6(h), italics added.) WCAB Rule 10957.1 states that the petition appealing an IMR determination "…shall be filed with the Workers' Compensation Appeals Board no later than 30 days after *service by mail* of the IMR determination." (Italics added.) This rule reflects our understanding that the intended meaning of the term "mailing" in section 4610.6(h) is equivalent to and means "service by mail."[8]

Here, the WCJ found applicant's IMR appeal untimely. The WCJ concluded that the 30-day prescribed time period to timely file an IMR appeal pursuant to section 4610.6(h) is triggered by the "mailing" of the IMR determination letter; that there is no mention of "service" in 4610.6(h); and that "mailing" is an act or occurrence other than service.

In *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679 [57 Cal.Comp.Cases 644], the Supreme Court considered whether C.C.P. section 1013(a) extends the 45-day period set forth in section 5950 by five calendar days for application to the California Court of Appeal for writ of review of an opinion of the WCAB. The Supreme Court held that the triggering event for the 45-day period in section 5950 is identified in the statute as the "…*filing* of the order." *(Id.* at p. 684, italics in original.) "Filing is accomplished independently of service." (*Id.*, at p. 686.)

> There is no reference in this statute to service. The operative trigger of the time period set forth in section 5950 is the *filing* of the order. '[T]he cases have consistently held that where a prescribed time period is commenced by some circumstance, act or occurrence other than service then [C.C.P.] section 1013 will not apply. [Citations.] [¶] On the other hand, where a prescribed time period is triggered by the term "service" of a notice, document or request then section 1013 will extend the period. [Citations.]'(*Id.*, at pp. 684-685, fn 4 omitted, italics in the original.)

In *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, the Supreme Court addressed the issue of whether C.C.P. section 1013 extended the time for a party in a civil action to

[8] The Administrative Director and the Appeals Board have "…power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this Code." (§ 133.) The Appeals Board may adopt reasonable and proper rules of practice and procedure. (§ 5307(a)(1).) Moreover, the Appeals Board is not bound by the statutory rules of procedure; instead, proceedings before the Appeals Board are governed both by the Labor Code and by its rules of practice and procedure. (§ 5708.)

accept a C.C.P. section 998 settlement offer. C.C.P. section 998(b)(2) states that "…any party may *serve* an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered..." (Italics added.) The Court determined that:

> [u]nder 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. (*Id.*, at p. 274, fn. 4.)

It then held that when a C.C.P. section 998 offer is served by mail, C.C.P. section 1013 applies to extend by five calendar days the statute's 30-day period to respond to the offer. (*Id.*, at p. 275.)

Here, we analyze the trigger for the 30-day period to file an IMR appeal found in section 4610.6 in light of the Supreme Court's analysis in *Camper* and *Poster*. An IMR determination must be in writing and provided to the employee and employer. (§ 4610.6(d), (f), (h).) Section 4610.6(h) specifically states that the IMR determination will be *mailed* to the employee and the employer. (*Id.*) However, as in *Camper* and section 5950, there is no specific mention of "service" in section 4610.6(h). Thus, the issue presented is whether the "mailing" of the written IMR determination to the employee or employer is equivalent to and means service by mail, or if "mailing" is an act or occurrence other than service. (See *Camper*, *supra*, 3 Cal.4th at pp. 684-685.)

We previously addressed this issue in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc) in relation to section 4062.2(b) and the selection of an agreed medical examiner (AME).

> 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**.
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> The party requesting a QME panel submits that request to the DWC Medical Unit. It, therefore, makes sense to require explicitly that a 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."** (*Id*., at pp. 963-964, emphasis added.)

Finally, the recent panel decision in *Razo v. Las Posas Country Club* (2014) 2014 Cal.Wrk.Comp.P.D. LEXIS 12[9] held that the trigger for the parties to strike a name from a qualified medical examiner (QME) panel under section 4062.2(c) is not the act of "assignment," but the date the QME panel assignment is mailed by the Administrative Director to the parties. (*Id*., at pp. 13-17.)

> …the right to strike a name would be meaningless unless the identity of the panel QMEs is communicated to parties by the Administrative Director via U.S. mail. Pursuant to Code of Civil Procedure 1013(a), when a party has a time limit to respond to a document received by U.S. mail, five calendar days is added so that a party has a total of 15 days after assignment to strike a name from the QME panel. (*Id*., at pp. 16-17.)[10]

WCAB Rule 10957.1(c) specifically mentions "service by mail" as the trigger for responding to an IMR determination. This rule reflects the intended meaning of "mailing" in light of the relevant case law.[11] An IMR determination must be reduced to writing and mailed.[12] (§ 4610.6(d), (f), (h).) Thus, "…there is no need for a redundant service requirement." (*Messele, supra*, 76 Cal.Comp.Cases at 964.)

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[9] This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citeable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to *Razo, supra*, because it considered a similar issue. We recommend that practitioners proceed with caution when citing to a panel decision and verify its subsequent history.

[10] We need not address the 2007 writ denied case of *Alvarado v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1142 given our holdings in *Messele* and *Razo*. "To reiterate, we disagree with Alvarado's reasoning that "assignment" alone triggers a party's right to strike a name." (*Razo, supra*, 2014 Cal.Wrk.Comp.P.D. LEXIS at 16-17.)

[11] The Administrative Director and the Appeals Board have "…power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this Code." (§ 133.) The Appeals Board may adopt reasonable and proper rules of practice and procedure. (§ 5307(a)(1).) Moreover, the Appeals Board is not bound by the statutory rules of procedure; instead, proceedings before the Appeals Board are governed both by the Labor Code and by its rules of practice and procedure. (§ 5708.)

[12] Section 4610.6(d) states in pertinent part that:

> The organization shall complete its review and make its determination in writing. . .

Section 4610.6(f) states in pertinent part that:

In other words, the term "mailed" in section 4610.6(h), which is the trigger for the 30-day period for a timely filed IMR appeal, is equivalent to and means "service by mail."

Consequently, the 30-day period to file an appeal of an IMR determination pursuant to section 4610.6(h) runs from the date the IMR determination is served by mail.

II. The 30-Day Period to File a Timely Appeal from an IMR Determination Under Section 4610.6(h) Is Extended by Five Days Pursuant to the Provisions of Section 5316 and C.C.P. Section 1013(a).

We next address the issue of whether the 30-day period to file an appeal of an IMR determination pursuant to section 4610.6(h) is extended by five days pursuant to the provisions of section 5316 and C.C.P. section 1013(a). Section 5316 provides that: "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 [A]ppeals [B]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 [A]ppeals [B]oard."

As section 4610.6 and section 5316 are both in Division 4 of the Labor Code, the provisions of section 5316 apply to IMR appeals under section 4610.6(h), and the Appeals Board has not "otherwise directed."[13] Section 5316 refers to Chapter 5, title 14 of Part 2 of the Code of Civil Procedure, which

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> The independent medical review organization shall provide the [A]dministrative [D]irector, the employer, the employee, and the employee's provider with the analyses and determinations of the medical professionals reviewing the case. . .

Section 4610.6(g) states in pertinent part that:

> A determination of the [A]dministrative [D]irector pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the [A]dministrative [D]irector, filed with the [A]ppeals [B]oard for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer . . .

[13] WCAB Rule 10507 may "otherwise direct" in other circumstances; however, it does not apply here because section 4610.6(h) refers to the service by mail of the IMR determination by the Administrative Director. (§ 4610.6(g).) WCAB Rule 10507(c) applies when "…service is made by the Workers' Compensation Appeals Board, a party, a lien claimant, or an attorney or other agent of record." It does not apply when service is made by the Administrative Director. (*Id.*) However, we observe that the five-day extension of time in WCAB Rule 10507 is consistent with section 5316 and Code of Civil Procedure section 1013(a) under the circumstances here.

consists of C.C.P. section 1010 et seq. As applicable here, C.C.P. section 1012 authorizes service by mail, and C.C.P. section 1013(a) states that

> [i]n case of service by mail, … 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.*… (Italics added.)

The 30-day period under section 4610.1(h) to file an appeal in response to an IMR determination, which has been provided by mail, is extended by five calendar days pursuant to section 5613 and C.C.P. section 1013(a).[14]

Accordingly, based upon our review of the relevant statutes and case law, we hold that the term "mailing" contained in section 4610.6(h) is equivalent to and means "service by mail." We also hold that the 30-day period to file a timely appeal from an IMR determination under section 4610.6(h) is extended by five days pursuant to the provisions of section 5316 and C.C.P. section 1013(a).

Here, it is undisputed that applicant filed her IMR appeal on the 34th day after the IMR determination was provided by mail. Section 5316 and C.C.P. section 1013(a) extend the time to file an appeal from an IMR determination by five calendar days. Thus, applicant had 35 days to file an IMR appeal.

Therefore, we find that applicant's IMR appeal was timely filed on the 34th day. Accordingly, we rescind the Findings & Order and we return this matter to the trial level so that the WCJ may consider the merits of applicant's IMR appeal and issue a new decision.

For the foregoing reasons,

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[14] The five calendar day extension of time granted through section 5316 and Code of Civil Procedure section 1013(a) only applies to the number of days to *respond* to the IMR determination, i.e. to file an IMR appeal. We note that if an aggrieved employee chooses to mail the IMR appeal for filing at a district office, the employee takes the risk that the appeal may not be *received* for filing within the time period prescribed by section 4610.5(h)(1) and WCAB Rule 10957.1(c).

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc) that the Findings and Order issued on February 20, 2015 by the workers' compensation administrative law judge is **RESCINDED,** and the matter is **RETURNED** to the trial level for further proceedings and a decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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

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

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

/s/ Katherine A. Zalewski
KATHERINE A. ZALEWSKI, Commissioner

/s/ Jose H. Razo
JOSÉ H. RAZO, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

09/17/2015

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

JOANN MATUTE
MOORE & ASSOCIATES
HAYFORD & FELCHLIN

AS:AF/abs/jmp