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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. ADJ4193239 (RDG 0115027)

SERGIO OSEGUERA,

Applicant,

vs.

**LINKS COMMUNICATIONS; ZURICH SAN
FRANCISCO,**

Defendant.

**OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the November 12, 2009 Findings and Award of the workers' compensation administrative law judge (WCJ) who found that applicant's admitted industrial injury to his low back while working for defendant as a cable installer on May 26, 2001, caused 73% permanent disability before apportionment and 61% permanent disability after apportionment, with a need for future medical treatment. The WCJ further found that the reporting of the parties' Agreed Medical Examiner (AME) Ian MacMorran, M.D., was not substantial evidence, and that defendant violated California Code of Regulations, title 8, section 10718 by communicating directly with Richard Baker, M.D., the "regular physician" appointed by the WCJ to examine applicant and report on his condition pursuant to Labor Code section 5701, but that the reports of Dr. Baker would be allowed into evidence notwithstanding that violation.¹

Applicant contends that the reporting of Dr. MacMorran is substantial evidence that supports a higher finding of permanent disability and that the reporting of Dr. Baker should have been stricken from the record because of defendant's violation of Board Rule 10718.

¹California Code of Regulations, title 8, section 10718 is hereafter called "Board Rule 10718." Further statutory references are to the Labor Code.

1 An answer was received along with the WCJ's Report and Recommendation on Petition for
2 Reconsideration (Report).

3 We grant reconsideration, rescind the November 12, 2009 Findings and Award except for
4 the finding that defendant violated Board Rule 10718 (Finding number 8), and order the reports of
5 Dr. Baker stricken from the record. The case is returned to the trial level for further proceedings
6 and a new decision. The reporting of Dr. Baker should have been stricken from the record by the
7 WCJ because of defendant's violation of Board Rule 10718. Upon return, applicant may present
8 his other contentions to the WCJ, and the WCJ may appoint a new medical examiner pursuant to
9 section 5701 if he deems that to be appropriate.

10 It is admitted that applicant incurred industrial injury to his low back as described above.
11 However, the parties were unable to agree on the level of permanent disability caused by the injury
12 and they selected Dr. MacMorran as their AME to evaluate and report on applicant's condition.
13 The WCJ thereafter determined that Dr. MacMorran's reporting was not substantial medical
14 evidence, and appointed Dr. Baker as a "regular physician" to evaluate applicant pursuant to
15 section 5701 and to report on his condition.² Applicant sought removal of the case to the Appeals
16 Board following that action, but removal was denied by order of a different panel of the Appeals
17 Board on April 24, 2007. In its Order Denying Removal, the earlier panel noted that
18 notwithstanding the absence of a statutory provision for appointment of an independent medical
19 examiner following the repeal of former section 139.1, section 5701 continues to provide a means
20 for developing the medical record by appointment of a regular physician.

21 The WCJ wrote a letter to Dr. Baker about the case, but the correspondence only included
22 copies of some of the documents that were described in the letter as enclosures. Dr. Baker
23 contacted applicant's attorney to obtain copies of the documents that were not enclosed with the

24 ² The WCJ writes in his Report that Dr. MacMorran is no longer authorized to provide reports in workers'
25 compensation cases. Section 5701 provides in full as follows: "The appeals board may, with or without notice to
26 either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the
27 timebooks and payroll of the employer to be examined by any member of the board or a workers' compensation judge
appointed by the appeals board. *The appeals board may also from time to time direct any employee claiming
compensation to be examined by a regular physician. The testimony so taken and the results of any inspection or
examination shall be reported to the appeals board for its consideration.*" (Emphasis added.)

1 WCJ's letter, but he was told that direct communication with the attorneys was not allowed.

2 As the date for further proceedings drew near, the office of defendant's attorney contacted
3 Dr. Baker's office on July 24, 2009, and inquired about the status of a supplemental report he was
4 to prepare as directed by the WCJ. The attorney was advised that the physician had not received
5 copies of all the documents described in the letter sent to him by the WCJ. Defendant's attorney
6 wrote Dr. Baker that same date and enclosed documents that she thought the physician needed
7 along with a cover letter marked as "URGENT." The attorney noted in the cover letter that Dr.
8 Baker had asked applicant's counsel to send the documents, "but you did not receive anything."
9 The documents sent by defendant's attorney included a transcript of Dr. Baker's October 14, 2008
10 deposition, which was requested during the earlier telephone call.

11 Applicant's attorney received a copy of that July 24, 2009 letter from defendant's attorney
12 to Dr. Baker, but it appears that a copy was not sent to the WCJ. On October 8, 2009, applicant's
13 attorney wrote the WCJ about the communications between defendant's attorney and Dr. Baker,
14 and reiterated an earlier verbal request at a pre-trial conference that Dr. Baker's reports be stricken
15 from the record because defendant violated Board Rule 10718.

16 Turning to applicant's contentions, we note that Board Rule 10718 provides in full as
17 follows:

18 "All correspondence concerning the examination and reports of a
19 physician appointed pursuant to Labor Code Section 5701 or 5703.5
20 shall be made through the Workers' Compensation Appeals Board,
21 and no party, attorney or representative shall communicate with that
22 physician with respect to the merits of the case unless ordered to do
23 so by the Workers' Compensation Appeals Board."

24 Defendant argues that the WCJ's decision to not strike the reporting of Dr. Baker was
25 correct because defendant's attorney only intended to transmit documents Dr. Baker needed to
26 complete the supplemental report, and the attorney's communication with the physician was not
27 made "with respect to the merits of the case" as described in Board Rule 10718. However, Rule
10718 plainly directs on its face that *all* correspondence to a physician appointed pursuant to
section 5701 *shall* be made through the WCAB, and *not* by any of the parties or their attorneys.

1 While it may be that the communication between defendant's attorney and Dr. Baker did not affect
2 his subsequent opinions, the fact that the direct communication occurred is sufficient to support the
3 disallowance of Dr. Baker's reports into evidence. This is because the impartiality and the
4 appearance of impartiality of a physician appointed pursuant to section 5701 are paramount.

5 As the court wrote in *Boardman v. Industrial Acc. Com.* (1956) 140 Cal.App.2d 273 [21
6 Cal.Comp.Cases 88] while discussing a similar rule, former Board Rule 10823:

7 "It is obvious from a study of it, that section 10823 was enacted to
8 make sure that the independent medical examiner would be not only
9 independent, but would be completely objective in his approach to,
10 and in his investigation of the medical question involved. To insure
11 this, the section prohibited him from considering data which did not
12 come to him through the commission or commissioners or referees,
13 and particularly prohibited 'the parties and attorneys or
14 representatives' from communicating with him *in any manner*. Dr.
15 Carr, in talking to Dr. Moon, the respondents' medical expert, no
16 matter how innocently, violated, if not the letter, the very spirit of
17 this section. Even if, as claimed by respondents, the weight of
18 evidence without Dr. Carr's report was on respondents' side, the
19 violation of section 10823 required that the commission entirely
20 disregard Dr. Carr's report.

21 "It may very well be that Dr. Carr would have come to the same
22 conclusion as to the cause of death he did, even if he had not talked
23 to Dr. Moon. However, the fact is that he did and appeared to place
24 some importance upon this fact. Moreover, *it is most important that*
25 *a rule such as that specified in section 10823 be observed and that*
26 *the report of the independent medical examiner be never subject to*
27 *the possibility that it is based upon matters imparted to him by one*
so closely connected with a party as to leave it questionable as to
whether the information imparted is objective and not partisan.

"The rule expressed in the section is a salutary one, and one which
should be enforced strictly. A report based, even in small part, on its
violation, is so tainted as to destroy its value." (Initial emphasis in
original, later emphasis added. Footnotes omitted.)

23 Although we do not find that the communication from defendant's attorney to Dr. Baker
24 was undertaken in bad faith, this does not change the fact that the communication occurred.³ Thus,
25 the WCJ's finding that Board Rule 10718 was violated by defendant was correct. However, the

26 ³ Defendant's attorney avers in the verified response to applicant's petition for reconsideration that she was unaware of
27 Board Rule 10718 at the time of her communication with Dr. Baker, and that she only intended to expedite his review
of relevant information and his preparation of a supplemental report.

1 conclusion that the reporting of Dr. Baker need not be stricken because of that violation was
2 incorrect. A party is entitled to know that an independent examiner appointed pursuant to section
3 5701 is truly providing an independent opinion that has not been influenced *in any way* by direct
4 communication from a party. Regardless of any good faith intentions of defendant's attorney, the
5 sending of correspondence, medical reports and other records directly to Dr. Baker was prohibited
6 by Board Rule 10718. The remedy for defendant's violation of Board Rule 10718 in this case is
7 the striking of the reports of Dr. Baker from the evidentiary record as requested by applicant.

8 Accordingly, we rescind the November 12, 2009 Findings and Award except for the finding
9 that defendant violated Board Rule 10718 (Finding number 8), and order the reporting of Dr. Baker
10 stricken from the record. The case is returned to the trial level for further proceedings. If upon
11 return the WCJ determines that there continues to be a need to develop the record, a different
12 regular physician may be appointed pursuant to section 5701 to evaluate applicant and report on
13 his condition. Thereafter, a new decision should issue based upon substantial medical evidence
14 that is properly received into the record.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's petition for reconsideration of the November 12, 2009
3 Findings and Award of the workers' compensation administrative law judge is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Appeals
5 Board that the November 12, 2009 Findings and Award is **RESCINDED**, except for Finding
6 number 8.

7 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Appeals
8 Board that the reporting of Richard Baker, M.D., is stricken from the record.

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WORKERS' COMPENSATION APPEALS BOARD

I CONCUR,

DEPUTY

FEB 10 2010

**Sergio Oseguera
Frederick Gibbons
Stockwell, Harris, Woolverton & Muehl**

OSEGUERA, Sergio

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

ADJ4193239, RDG 115027

SERGIO OSEGUERA, APPLICANT

LINKS COMMUNICATION AND
STATE COMPENSATION INSURANCE FUND,
DEFENDANTS

WORKERS COMPENSATION ADMINISTRATIVE
LAW JUDGE

BRIGHAM P. JONES

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant's occupation : Cable installer, group 481
Applicant's age : 27
Body parts injured : Low back
Mechanics of injury : Lifting
2. Identity of Petitioner : Applicant is petitioner
Timeliness of petition : Petition is timely (Deadline for filing fell on week end).
Verification : Petition is verified
3. Date of Issuance of Findings and Award : November 17, 2009
4. Petitioner's Contentions :
 1. The reports of AME Ian MacMorran are substantial medical evidence.
 2. The reports of IME Baker should be stricken based on Defendant's failure to fully comply with **CCR 10718**.

3. The reports of IME Baker are not substantial medical evidence.

II.

BACKGROUND

The parties selected Ian MacMorran to serve as AME. Following the trial, all exhibits, including the reports of Dr. MacMorran, were examined. His work was deemed to fall below the standard required for substantial medical evidence.

An opportunity was extended to the parties to develop the medical record. The WCJ forecast the appointment of an IME should Dr. MacMorran fail to raise the standard of his reports. Despite the generation of a variety of supplemental reports together with the deposition of Dr. MacMorran, the issues with the AME's reports were not resolved. This sequence is discussed at length in a Report and Recommendation on applicant's Petition for Removal.

Dr. Richard Baker was appointed. WCJ Jones sent a letter to Dr. Baker defining his assignment and remitting materials for his consideration.

Dr. Baker issued a report and was deposed. The parties asked that additional materials be sent to Dr. Baker, including a variety of reports from a treating physician named Dr. Light and deposition transcripts.

Applicant now also urges that a report from treating Dr. Kenneth Light of 1/24/05 be supplied. I agree. It was inadvertently omitted by this judge when the original transmittal letter was sent by the WCJ to Dr. Baker.

Prior to the generation of Dr. Baker's most recent report, his staff initiated contact with each counsel provoking two distinct responses. On the one hand, Applicant's attorney declined to carry on any dialogue whatsoever with Dr. Baker. By contrast, counsel for Defendant remitted some materials to the IME. Dr. Baker finalized his report which was found to be substantial medical evidence and served as the foundation to the Findings and Award of November 17, 2009.

III.

DISCUSSION

Despite extraordinary measures used to encourage AME Ian MacMorran to rectify deficiencies, he refused to do so. For this reason, Dr. Baker was appointed to evaluate the applicant's disability. Dr. Baker's assessment is empirically sound and is found to be substantial medical evidence.

Dr. Baker was appointed as an IME. His deposition was also taken. His reports are reliable, accurate, and are substantial medical evidence.

Applicant moves to strike Dr. Baker's reports, correctly pointing to the fact that a 7/24/09 transmittal letter from counsel for defendant had been sent without the knowledge or consent of the judge. **CCR 10718** forbids such communications. However, once the facts surrounding the preparation of the transmittal letter are examined, it can be seen that the letter was sent in good faith, applicant was not prejudiced, and that the letter was sent in response to an inquiry from Dr. Baker's staff. It seems that Dr. Baker's staff had sought records from each counsel in anticipation of an assignment to be completed by Dr. Baker. His staff apparently did not distinguish between the role of an AME versus that of an IME. The response to the inquiry made by applicant attorney was perfect. That is, they politely declined to maintain a written or verbal dialogue with the IME, diplomatically citing the regulation as to the role of an IME. By contrast, counsel for defendant sent a letter dated 7/24/09, enclosing records. No prejudice can be shown as a result of this act.

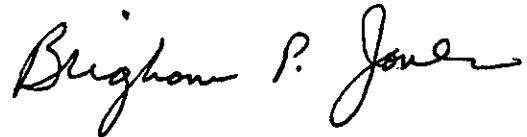
Applicant also urges that a report from treating Dr. Kenneth light of 1/24/05 be supplied. I agree. It was inadvertently omitted by this judge when my original transmittal letter was sent to Dr. Baker.

IV.

RECOMMENDATION

It is respectfully recommended that the Opinion on Decision pertaining to the November 17, 2009 Findings and Award be reformed to now include the heading "Opinion on Decision" which had been improvidently omitted; it is further recommended that the Petition for Reconsideration be denied.

DATE: 12/22/09



Brigham Jones
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

FREDERICK GIBBONS MARYSVILLE, US Mail

SERGIO OSEGUERA, US Mail

STOCKWELL HARRIS SACRAMENTO, US Mail

ZURICH SAN FRANCISCO, US Mail

On: ☐ parties and lien claimants present
X all parties as shown on Official Address Record

ON: 12/23/2009
BY: SANDRA WELLS