WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JUAN LICEA, *Applicant*

vs.

SCREWMATIC;
INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ10568300
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant Juan Licea seeks reconsideration of the May 21, 2021 Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that because "defendant has shown an 'articulable suspicion' existed that would support the decision to film applicant pursuant to Civil Code §1708.8," the sub rosa video taken of applicant may be submitted to the Qualified Medical Examiner (QME) for review. (F&O, Finding of Fact No.3.)

Applicant contends that because defendant "ha[s] not and cannot provide any articulable suspicion that Applicant has done any illegal activity or misconduct prior to the video," sub rosa video of applicant should not be submitted to the QME. (Petition for Reconsideration (Petition) at 4:1.)

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the May 21, 2021 F&O, and substitute Findings of Fact, which find that Civil Code section 1708.8 is

inapplicable in these proceedings, and order the parties to meet and confer to prepare a neutral cover letter to QME Dr. Georgis, and order the submission of the sub rosa films to the QME for review pursuant to Labor Code section 4062.3(a)(2).

FACTS

Applicant claimed injury to various body parts while employed as a machine operator on August 10, 2016. (March 17, 2021 Minutes of Hearing and Summary of Evidence (MOH) at 2:3.) Theodore Georgis, M.D., acted as the orthopedic QME in this matter. (See Exhibits 1, 3, and H, E-mail Exchanges; Exhibit F, Deposition Transcript of Theodore Georgis, M.D., November 19, 2020.)

Between November 2, 2020 and November 5, 2020, defendant obtained sub rosa video footage of applicant. (March 17, 2021 MOH, at 4:12-13.)

On November 12, 2020, defendant disclosed the existence of the sub rosa video to applicant, served a copy of the video on CD-ROM, and proposed its submission to QME Dr. Georgis for review. (Ex. B, Applicant's Objection Letter, dated November 23, 2020.) Applicant formally objected to its admissibility on November 23, 2020, citing "foundation, authentication and the rule of completeness under Evidence Code sections 356, 402-403, 1400-1401." (*Ibid*.) Applicant further objected to the proposed letter to the QME under Labor Code section 4062.3. Applicant demanded disclosure of the details incidental to the surveillance footage, and indicated the issue would be re-addressed following receipt of the requested information. (*Ibid.*)

On November 23, 2020, defendant filed a Declaration of Readiness to Proceed to expedited hearing regarding the medical-legal discovery dispute. The parties appeared at the expedited hearing on December 17, 2020. The WCJ converted the hearing to a mandatory settlement conference, and set the matter for trial.

The parties appeared at trial on March 17, 2021. The issues framed for decision were whether Civil Code section 1708.8 bars defendant from showing sub rosa film of applicant to QME Dr. Georgis absent a showing of an articulable suspicion, whether Civil Code section 1708.8 applies in workers' compensation cases, and whether defendant may send their advocacy letter of December 1, 2020 to Dr. Georgis. (March 17, 2021 MOH, at 2:7.)

Defense witness David Lopez testified that he was the investigator who personally captured the sub rosa video of applicant. Mr. Lopez described the circumstances surrounding his filming:

> His procedure is to drive to the residence and conduct surveillance from his vehicle. Once he sees the person, he turns his camera on. He then follows that person until they return to the home. In this case, he only captured 4 minutes of film on 2 November, 2 minutes of film on 4 November and about 13 minutes of film on 5 November. He reviewed footage prior to today. He believes Mr. Licea is the same person as in the virtual courtroom. The film accurately shows the surroundings and Mr. Licea. Mr. Licea is in the video.
> …
> He captured Applicant returning home on 2 days but not when he left. He only turned the camera on when he saw Mr. Licea. He only saw him out of the house for 19 minutes, 39 Seconds. Witness never obtained the consent from Applicant. (March 17, 2021 MOH, at 4:14-20; 6:23-25.)

The WCJ reviewed the surveillance footage. (March 17, 2021 MOH, 4:23 to 6:6.) As relevant herein, the WCJ summarized the video as depicting the following: On November 2, 2020, applicant in front of his home, moving trash cans, carrying trash cans from the street to the driveway, picking some fruit, and entering his home through the front door. On November 4, 2020, applicant driving from his driveway to the street, parking the car and walking to his front door, and three passengers exiting the vehicle. (*Id*. at 5:7.) On November 5, 2020, applicant parking his SUV and washing it, retrieving a stool from within the home, and later returning it, returning to the vehicle and driving the vehicle. (*Id.* at 5:21.*)* On the same day, applicant exiting a mini-market and driving from the mini-market. Applicant with a woman in front of his house near the vehicle, the woman entering the vehicle on the driver's side, applicant entering on the passenger-side. Applicant getting out of the vehicle and returning with a cane, and getting back into the vehicle. Applicant walking with the woman, in what appears to be a parking lot, and returning to the vehicle. (*Id*. at 6:3.) Finally, applicant near the citrus tree in his front yard near the front door. (*Id.* at 6:5.)

Mr. Lopez also testified that he used a camera with a zoom feature, and that the films captured persons in addition to applicant. (March 17, 2021 MOH, at 7:1.)

Trial was continued to April 22, 2021. As relevant herein, applicant testified that the video shows his residence in Glendora, and did not deny that he was the individual identified in the video. (April 22, 2021 MOH, at 2:22-4:11.) Two of his grandchildren, Abner (age 14) and

Alessandra (age 15) are in the video from November 2, 2020. (*Id*., at 2:13-14.) The WCJ summarized applicant's testimony as follows:

> When asked whether the investigator came on to his property he said yes. He then clarifies that the investigator was walking in front of his house not on his property. He was about 15 steps away from the witness. He agrees with the Defense Attorney that this was 15 feet.
> …
> The investigator was close to his house. He knows it was the investigator because [the investigator] was looking at the witness' house and looked very suspicious. This was the same Mr. Lopez who testified at the last trial. (MOH, at 4:21-23; 5:3-5.)

The WCJ issued the F&O on May 21, 2021. The WCJ determined, in relevant part, that defendant had met its burden of establishing an "articulable suspicion" that would "support the decision to film applicant pursuant to Civil Code § 1708.8." (F&O, Finding of Fact No. 3.) The parties were ordered to provide the film to QME Dr. Georgis for review and comment. (F&O, Order No. 1.)

DISCUSSION

Applicant contends that certain provisions of the Civil Code create an evidentiary bar in these workers' compensation proceedings.

The California workers' compensation system was intended by the legislature to be a complete system, as described in Divisions 4 and 5 of the Labor Code. Labor Code section 3201 provides:

> This division and Division 5 (commencing with Section 6300) are an expression of the police power and are intended to make effective and apply to a complete system of workers' compensation the provisions of Section 4 of Article XIV of the California Constitution.

Article XIV provides in relevant part that "administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character. . ." (Cal.Const., art XIV, § 4.) Thus, under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court of limited jurisdiction that reviews and decides appeals from decisions issued by workers' compensation administrative law judges. (Cal. Const., art. XIV, § 4; §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.; *Bankers Indemnity Ins. Co. v. Industrial Acc. Com.* (1935) 4 Cal.2d 89; *Fremont Indemnity v. Workers'*

Comp. Appeals Bd. (1984) 153 Cal.App.3d 965 [49 Cal.Comp.Cases 288]; *Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376 [57 Cal.Comp.Cases 391] ["[t]he WCAB . . . is a constitutional court"].)[1]

In *Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1087-1088 [80 Cal.Comp.Cases 1262], the Court of Appeal explained that: "The state Constitution gives the Legislature 'plenary power…to create…and enforce a complete system of workers' compensation.' (Cal. Const., art. XIV, § 4.) Acting under this power, the Legislature enacted the workers' compensation law to govern compensation to California workers who are injured in the course of their employment. (§ 3201 et seq.)."[2] Consequently, the right to workers' compensation benefits is wholly statutory. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 389 [58 Cal.Comp.Cases 286]; *Graczyk, supra*, 184 Cal.App.3d at pp. 1002-1003.)

Participation in the workers' compensation system is compulsory. (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 732 [76 Cal.Comp.Cases 1282]; see *Vacanti, supra*, 24 Cal.4th at pp. 812-814; *Noe v. Travelers Ins. Co.* (1959) 172 Cal.App.2d 731, 734-735 [24 Cal. Comp.Cases 189] [emphasizing that workers' compensation is an exclusive remedy].) "The workers' compensation law requires employers to secure the payment of workers' compensation benefits either by purchasing third party insurance or by self-insuring with permission from the Department of Industrial Relations." (*Stevens*, supra, 241 Cal.App.4th at p. 1087 [citing § 3700 and *Denny's Inc. v. Workers' Comp. Appeals Bd.* (2003) 104 Cal.App.4th 1433, 1439 [68 Cal.Comp.Cases 1].)

The workers' compensation system "was intended to afford *a simple and nontechnical path* to relief. (Italics added.)" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624]

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[1] Under this constitutional grant of plenary power to the Legislature, the California Workers' Compensation Act (§ 3200 et seq.) was enacted "to establish a complete and exclusive system of workers' compensation including 'full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State . . . .'" (*Crawford v. Workers' Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 163 [54 Cal.Comp.Cases 198] citing Cal. Const., art. XIV, § 4; § 3201; *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002 [51 Cal.Comp.Cases 408].)

[2] "The underlying premise behind this statutorily created system … is the '"compensation bargain[,]"' … [under which] 'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. (Italics added.)'" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 [65 Cal.Comp.Cases 1402].)

citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.) In order to further the goal of expeditious adjudication of disputes, informal rules of pleading apply to workers' compensation proceedings. (See Cal. Code Regs., tit. 8, former § 10397, now § 10617 (eff. Jan. 1, 2020); *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal. App. 3d 1452, 1456 [52 Cal. Comp. Cases 141]; see also *Claxton v. Waters* (2004) 34 Cal. 4th 367, 373 [69 Cal.Comp.Cases 895]; *Sumner v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972, 973 [48 Cal.Comp.Cases 369].)

The Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (*Barr v. Workers' Compensation Appeals Bd.*, 164 Cal. App. 4th 173, 178 [73 Cal. Comp. Cases 763].) Labor Code section 5708 states:

> All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.

Labor Code section 5709 further provides:

> No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

"[T]aken together, sections 5708 and 5709 allow the WCAB considerable discretion to conduct its business in a manner quite unlike civil litigation; in fact, the WCAB is unencumbered by formality or traditional rules of evidence and procedure." (*Barr v. Workers' Compensation Appeals Bd.*, *supra*, at 178.)

Applicant contends that California Civil Code section 1708.8 applies in these proceedings, and requires a showing of an "articulable suspicion" on the part of defendant to justify the decision to obtain sub rosa surveillance video. Applicant contends that because defendant failed to articulate

its suspicions either prior to the surveillance, or at the subsequent evidentiary hearing, the sub rosa video taken of applicant was impermissibly obtained and may not be submitted to the QME.

Enacted in 1998, Civil Code section 1708.8 was introduced in the wake of the death of Lady Diana, Princess of Wales following a high speed vehicular chase by paparazzi, as a curb on the "aggressive and often dangerous paparazzi-like behavior of tabloid journalists." (*Richardson-Tunnell v. School Ins. Program* (2007) 157 Cal. App. 4th 1056 (72 Cal. Comp. Cases 1612).) The statute "imposes *liability* for an invasion of privacy with the intent to capture a visual image, sound recording or other physical impression of the plaintiff engaging in a personal or familial activity; as a remedy, it provides treble damages as well as disgorgement of profits." (*Ibid*., *emphasis added.*) "[I]t is clear the legislature intended to prevent paparazzi, photographers or other journalists from invading the privacy of individuals and then selling the images unlawfully obtained by stealth…The statute addresses the sale or broadcast of images or recordings obtained by invading plaintiff's privacy." (*Turnbull v. ABC*, No. CV 03-3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351, at *72-74.). The statute creates civil liability for the invasion of privacy, either actual (subsection (a)), or constructive (subsection (b)). The statute defines the nature and scope of damages that can be recovered, and the rights and remedies available to persons whose privacy has been unlawfully infringed (subsections (d), (e) and (h)).

However, while the statute creates a *civil* cause of action for recovery of damages, it does not create an evidentiary standard of admissibility in workers' compensation proceedings. Civil Code section 1708.8 is framed in terms of civil liability, not evidentiary preclusion.

This was among the holdings in *Duong v. Automobile Club of Southern California* (October 7, 2014, ADJ1479326 [ANA 0411799], ADJ7233578) [2014 Cal. Wrk. Comp. P.D. LEXIS 492], a case involving sub rosa video taken of an applicant in the parking lot of a mobile home park and in a grocery store.[3] Therein, we observed that "[t]he proceedings before us do not pertain to civil tort liability but rather the admissibility of evidence before the Appeals Board, [t]herefore, Civil Code section 1708.8 appears to be inapplicable." (*Duong*, *supra,* at 10.) Because

[3] 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 citable 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, 242, 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 *Duong* because it considered a similar issue.

Civil Code section 1708.8 was inapplicable, and because applicant had no reasonable expectation of privacy in the parking lot of a mobile home park, or in a grocery store, the sub rosa video of applicant in *Duong* was admissible and could be provided to the QME in that case. In the present matter, applicant seeks to distinguish *Duong* by asserting that the surveillance films depict applicant while he was in his front yard, a place where applicant had a reasonable expectation of privacy. (Applicant's Trial Brief, dated May 10, 2021, at 4:23.) However, applicant's argument seeks to distinguish *Duong* on the specific circumstances under which the sub rosa video was taken (i.e. in the front yard of his home), but fails to address the threshold question of why a civil liability statute would serve as an evidentiary bar in workers' compensation proceedings.

In the absence of a persuasive argument for why a civil tort statute would serve to bar evidence in a collateral administrative law proceeding, or how such a statute would interact with the relaxed evidentiary posture of workers' compensation proceedings, we discern no compelling argument to read Civil Code section 1708.8 as creating an evidentiary threshold herein. Accordingly, we conclude that Civil Code section 1708.8 is inapplicable to these proceedings.[4]

However, and notwithstanding the inapplicability of Civil Code section 1708.8, we further observe that applicant retains a constitutionally protected right to privacy. The California Constitution provides that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const. art. I, § 1.) However, the constitutional right to privacy is not absolute. The Supreme Court has defined the elements of a cause of action for violation of the constitutional right to privacy: "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) Moreover, even if

[4] Although we conclude that Civil Code section 1708.8 is inapplicable as an evidentiary bar in workers' compensation proceedings, we also note that the Court of Appeal in *Richardson-Tunnell* discussed the statutory exemptions present for certain investigative activities: "After the 'articulable suspicion' language was added to Senate Bill 262 in August of 1998, legislative analysts continued to describe the bill as 'Exempt[ing] from the scope of these causes of action lawful activities of law enforcement of other governmental agencies *or other entities, public or private,* designed to obtain evidence of suspected illegal activity, insurance fraud, or a pattern of business practices which adversely affect the health or safety of the public.' (*Richardson-Tunnell v. School Ins. Program, supra*, 72 Cal. Comp. Cases 1612, 1618, *emphasis added*.) The question of whether the sub rosa video herein was obtained pursuant to such an investigative effort is not addressed substantively by either party, and we express no opinion in this regard.

the three elements are met, "no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests." (*Hernandez v. Hillsides, Inc.,* (2009) 47 Cal.4th 272, 287.)

Generally, there is no reasonable expectation of privacy in settings where activities are conducted in an open and accessible space, within the sight and hearing of the general public or of customers or visitors to that open and accessible space. (*Hernandez*, *supra*, 47 Cal.4th at p. 290; see also *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 448–449 [CyberCafe customers did not have legally protected privacy right in their activity on the premises].) The right to privacy in the front yard of a person's home is subject to the same considerations, including whether the activities are within the sight and hearing of the general public. The Court of Appeal discussed those privacy expectations in *People v. Mendoza* (1981) 122 Cal. App. 3d Supp. 12, a case involving an assertion of right to privacy in a yard enclosed by chain-link fence:

> In applying the principles of law to the cases which come before us, we should not lose sight of the everyday facts of life. Fencing around the front yard of a residence is a common situation and ordinarily includes a gate at the point where a sidewalk leads to the front door. Such fences have obvious purposes other than excluding the public, such as discouraging dogs, children, handbill deliverymen and others from walking across the front lawn and flower beds. In the absence of a locked gate, a high solid fence blocking the front yard from view, a written notice to keep out or "beware of dog," or perhaps a doorbell at the front gate, anyone having reason to talk to the residents would be expected to open the front gate, walk up to the house and knock on the door. Likewise, if a resident was in the front yard too far away from the fence to talk with easily, it would be entirely natural and appropriate to open the gate without asking permission and to approach the person in order to converse in normal tones. At least, this would be the case in the absence of a warning from the occupant that the visitor was unwelcome.
>
> There is simply no reasonable expectation of privacy in the front yard of a residence under such conditions. It is no more closed off to the public, expressly or impliedly, than any other front yard with a sidewalk to the front door. Even without a fence the public is not expected nor encouraged to walk wherever desired through the front yard; that's why a sidewalk is provided. The fact that a chain-link fence is installed is not commonly considered a deterrent to entering a front yard to the same extent as if unfenced, in the absence of other evidence to the contrary. (*Mendoza*, supra, at 14-15.)

Thus, there is no reasonable expectation of privacy in the front yard of a residence that is plainly visible from the street, absent additional indicia such as a high wall or a doorbell at the front gate. In the present matter, the investigator confirmed that his procedure involved capturing

surveillance from his vehicle on the street, and following the subject until they returned home. (March 17, 2021 MOH at 4:14.) Applicant testified that although the investigator walked in front of the house, he never came onto applicant's property. (April 22, 2021 MOH at 4:21.) On this record, it appears that the entirety of the surveillance footage defendant seeks to have reviewed by the QME depicts activity that was in plain view from the street or from the sidewalk. We are persuaded that applicant could not maintain a reasonable expectation of privacy under those circumstances.

We also address applicant's contention that the members of his family depicted in the video did not provide authorization to be included in the surveillance films. Applicant testified that his grandchildren were minors at the time of the filming, and that neither he nor his family members gave defendant "permission to film and use." (April 22, 2021 Minutes at 2:13; Applicant's Trial Brief, at 4:19.) However, to the extent that applicant avers his spouse and grandchildren are subject to an alternative privacy-related standard, applicant puts forth no authority for this contention. We observe that for the family members incidentally captured in the sub rosa films, just as with applicant himself, there is no reasonable expectation of privacy for conduct in the front yard of a home that is plainly visible from the street and sidewalk.[5]

Here, defendant's intention in obtaining the sub rosa films is for submission to the QME as part of the medical-legal evaluation process, pursuant to Labor Code section 4062.3(a)(2). Labor Code section 4062.3(a)(2) specifies that "any party may provide to the qualified medical evaluator selected from a panel any of the following information…Medical and nonmedical records relevant to determination of the medical issue." We have previously held that sub rosa video is "information" as contemplated by section 4062.3(a)(2), and that parties wishing to submit video evidence to a QME must comply with the notice and dispute resolution protocols of section 4062.3(b). (*Maxham v. California Dept. of Corr. and Rehab.* (2017) 82 Cal. Comp. Cases 136 [2017 Cal. Wrk. Comp. LEXIS 6] (Appeals Bd. en banc); see also *Martinez v. Allied Barton Security*, September 4, 2020, ADJ9202916 [2020 Cal. Wrk. Comp. P.D. LEXIS 289]; *Wan v.*

[5] With respect to applicant's contention that permission was required of family members and minors also appearing in the video, we note that Civil Code section 3344 provides for tort liability where any person "knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian." Here, any such concern is attenuated given the lack of commercial purpose in obtaining the sub rosa video, or in its potential review by a QME.

Community Health Network (San Francisco Gen. Hospital), April 13, 2015, ADJ5825581; ADJ9590533 [2015 Cal. Wrk. Comp. P.D. LEXIS 243].) Accordingly, it is permissible for a party to submit sub rosa video to the QME for the purpose of evaluating applicant's claimed injury and any resulting disability, and under the circumstances before us, we do not believe that the films were improperly obtained.

In summary, we conclude that Civil Code section 1708.8 describes the prerequisites to a *civil cause of action*, and is not an evidentiary bar in workers' compensation proceedings. We further conclude that although applicant retains a fundamental right to privacy under the California Constitution, applicant has not established a reasonable expectation of privacy for conduct in the front yard of a home that is plainly visible from the street and sidewalk or in the publically accessible parking lots where he was surveilled.

Accordingly, as our Decision After Reconsideration, we will rescind the May 21, 2021 F&O, and substitute Findings of Fact, which find that Civil Code section 1708.8 is inapplicable in these proceedings, and order the parties to meet and confer to prepare a neutral cover letter to QME Dr. Georgis, and order the submission of the sub rosa films to the QME for review pursuant to Labor Code section 4062.3(a)(2).

For the foregoing reasons,

IT IS ORDERED as our **DECISION AFTER RECONSIDERATION** that the May 21, 2021 Findings and Orders are **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Juan Licea, while employed as a machine operator at Los Angeles, California, by Screwmatic, claims to have sustained injury arising out of and in the course of employment on August 10, 2016.
2. Civil Code section 1708.8 is inapplicable to these proceedings.
3. Pursuant to Labor Code section 4062.3(a)(2), the sub rosa films taken by David Lopez between November 2, 2020 and November 5, 2020 are nonmedical records relevant to the determination of a medical issue.

ORDER

a. Exhibits B and C are admitted into evidence.
b. Exhibit A shall not be provided to QME Dr. Georgis.
c. The parties shall meet and confer and prepare a neutral cover letter to QME Dr. Georgis, with jurisdiction reserved to the WCJ in the event of a dispute.
d. The sub rosa films taken by David Lopez between November 2, 2020 and November 5, 2020 shall be provided to QME Dr. Georgis pursuant to Labor Code section 4062.3(a)(2).

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 28, 2022

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

JUAN LICEA
LAW OFFICES OF JIE CI DING, INC.
TOBIN LUCKS

SAR/abs

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

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

CASE NUMBER: ADJ10568300

JUAN LICEA	**-vs.-**	**SCREWMATIC;**
		INSURANCE CO OF THE
		WEST SAN DIEGO;

WORKERS' COMPENSATION JUDGE: ROGER A. TOLMAN, JR.
DATE OF INJURY: 10 August 2016

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Applicant, JUAN LICEA, by and through his attorney of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of 24 May 2021. In it applicant's counsel argues that the Findings of Fact are not supported by the evidence in that defendant did not present evidence of an "articulable suspicion" for purposes of determining whether defendant complied with Civil Code § 1708.8 prior to hiring an investigator to conduct surveillance of the applicant. Applicant's attorney also points out that defendant did not object to the report of the PQME before receiving the film.

To date, no Answer to the Petition has been received, however, should no Answer arrive, the Appeals Board may wish to consider defendant's trial brief dated 26 April 2021 which contains an interesting discussion of the case law interpreting Civil Code § 1708.8 [See Defendant's Trial Brief pp. 2 - 7.] It also discusses defendant's assertion that they had an "articulable suspicion" under Civil Code § 1708.8. [See Defendant's Trial Brief pp. 7 – 9.]

It is recommended that reconsideration be denied.

FACTS

Applicant, JUAN LICEA, aged 69 on the date of injury, while employed by SCREWMATIC, insured by the INSURANCE COMPANY OF THE WEST, sustained injury arising out of and in the course of employment on 10 August 2016. The applicant was initially represented by an attorney named Michael Sanchez. The parties went through the panel selection process and obtained a panel QME report from a Dr. Georges.

Thereafter, on or about 05 October 2017, applicant signed a Compromise and Release of the matter. He then questioned his attorney about the terms, was dissatisfied and hired his present attorney, Jie Ci Ding. She then filed a timely Petition for Reconsideration challenging the Order Approving Compromise & Release that the document was not properly explained to him. On 06 December 2017, the Appeals Board denied the Petition as premature but ordered that the parties treat the Petition as one to set aside and to have a hearing on the issue as to whether the Order Approving Compromise and Release (OACR) should be rescinded. At the trial on the issue, applicant testified that his attorney at the time, Mr. Sanchez, failed to explain the settlement adequately. By contrast, Attorney Sanchez testified that he did explain the terms of the settlement to Mr. LICEA. On 28 January 2019, Judge Bewick determined that the OACR be rescinded. In his Opinion on Decision he indicated that Mr. Sanchez credibly testified that he explained the settlement while Mr. LICEA credibly testified that he did not understand that the settlement resolved all parts of body at issue and did not understand that future medical was closed in the settlement. Judge Bewick set aside the OACR in the Findings and Order of 11 March 2019.

Thereafter, on 02, 04 and 05 November 2020 took surveillance video of applicant in front of his home and in front of his doctor's office. The video is not dramatic but appears not to be insignificant either. It shows him walking to and from his front door to his car and from the street to his yard. In one piece of video he is seen pulling empty plastic trash barrels from the street to his yard. On another occasion, he is cleaning the windows of a small compact station wagon. All of the film appears to be taken from public roadways and not private property and the testimony of both the applicant and the investigator bears this out. The film appears to be taken from about 30 to 40 feet away from the applicant and there are no telephoto shots that intrude either into the back yard or into the house. All of the film appears to be of views that would be visible from public property.

That said, both applicant and his attorney found the film to be offensive. They point out that the film included shots of the applicant talking to his grandchildren who are minors, ages 14 & 15 at the time. The applicant also testified that he did not bring the full trash barrels to the street, that this was done by one of his grandchildren, but that he only took the empty barrels back from the street.

The investigator testified as to his observations and that his assignment was to capture applicant's activities, "any activities." No documents were admitted into evidence as to the investigator's assignment and the adjuster neither testified nor provided documentation as to why they hired an investigator.

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DISCUSSION

This case presents the interesting issue as to whether and to what extent defendant must have an "articulable suspicion" of illegal activity before deciding to hire an investigator. The operative statute is Civil Code § 1708.8 which provides in relevant part:

> **(a)** A person is liable for physical invasion of privacy when the person knowingly enters onto the land or into the airspace above the land of another person without permission or otherwise commits a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.
>
> **(b)** A person is liable for constructive invasion of privacy when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.
>
> **(g)** This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private, who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity or other misconduct, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health, or safety.
>
> **(*l*)**
> **(1)** For the purposes of this section, "private, personal, and familial activity" includes, but is not limited to:
> **(A)** Intimate details of the plaintiff's personal life under circumstances in which the plaintiff has a reasonable expectation of privacy.
> **(B)** Interaction with the plaintiff's family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy.
> **(C)** If and only after the person has been convicted of violating Section 626.8 of the Penal Code, any activity that occurs when minors are present at any location set forth in subdivision (a) of Section 626.8 of the Penal Code.
> **(D)** Any activity that occurs on a residential property under circumstances in which the plaintiff has a reasonable expectation of privacy.
> **(E)** Other aspects of the plaintiff's private affairs or concerns under circumstances in which the plaintiff has a reasonable expectation of privacy.
> **(2)** "Private, personal, and familial activity" does not include illegal or otherwise criminal activity as delineated in subdivision (g). However, "private, personal, and familial activity" shall include the activities of victims of crime in circumstances under which subdivision (a), (b), or (c) would apply.

Cal Civil Code § 1708.8

This Civil Code provision was enacted "to protect against the 'aggressive and often dangerous paparazzi-like behavior' of tabloid journalists,'" Richardson-Tunnell vs. Schools Ins. Program for Employers (SIPE) (2d Dist.Ct.App., 2007) 157 Cal.App 4th 1056 at 1063; 69 Cal.Rptr 3d 176 at 181, citing Senate Rules Com., Office of Senate Floor Analyses, 3d reading analysis of Senate Bill No. 262 (1997 – 1998 Regular Session) as amended 18 August 1998.

Also, under California law, the right to privacy is enshrined in the Declaration of Human Rights at Cal.Constit. Article 1, § 1. While the Constitutional Right to Privacy and its Tort law right of action are not directly on point here, it is instructional to review the case-law where the statute in question here, Civil Code § 1708.8, appears to be based on the same human right to privacy. It may also be instructive in determining the limits to the protections contained in Civil Code § 1708.8.

Distilling the numerous cases citing the Constitutional Right to Privacy in Article 1 § 1, one sees that the Right to Privacy is not absolute. Generally, for there to be a violation, there has to be an "invasion" of a legally protected privacy interest or expectation of privacy, the expectation of privacy must be reasonable and the invasion must be serious and must be counterbalanced with other interests. See, for example, Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC (2015) 239 Cal.App.4th 808 at 821; 191 Cal.Rptr.3d 564 at 574. By the same token, the right to privacy is most strongly protected in one's home. See Tom v. City and County of San Francisco (2004) 120 Cal.App.4th 674; 16 Cal.Rptr.3d 13.

Yet, the right to privacy action based on an intrusion upon seclusion appears to require either an actual physical intrusion or a sensory intrusion into a zone of privacy. See Robinson v. Managed Accounts Receivable Corp. (C.D.Cal. 2009) 654 F.Supp.2d 1051.

The questions here are threefold: (1) Whether filming of a front yard and the curb area of a person's home is an "intrusion" and in violation of Subparts (a) and (b) of section 1708.8? (2) Whether filming the area between a parking space and a medical office constitutes an intrusion under those same subsections? And (3) If an intrusion is shown under sub-parts (a) or (b) whether the defendant is exempted from the requirements of the Civil Code section by subpart (g.)

Here, there is no evidence that sub-part (a) is in any way involved. There has been no trespass. There has been no physical intrusion into either the medical office or applicant's front yard or home. The testimony of both witnesses and the film itself clearly show that the defense investigator was at all times either parked across the street from the applicant's home or parked outside the medical offices filming the entrance to the building. Thus, sub-part (a) is not applicable to this case.

Sub-part (b) requires more analysis. Sub-part (b) deals with "constructive" intrusions where either zoom lenses or sound recording devices are used to record "personal or familial activity."

Here, while zoom lenses may have been used, the video recordings themselves do not depict a scene materially different than what would have been seen be the naked eye. No sound recordings were taken at all.

Also, while some interaction with family members is depicted in the film, this was incidental to the content and occurred outside the home itself in the front yard. There was

no depiction of the inside of the home through the windows using telephoto lenses and no depiction of the back yard at all.

The fact is, while there is a privacy interest in familial activity, such an interest can be waived if it occurs in the front yard where those standing in the public street may see.

With respect to the medical office entrance and parking lot footage, there appears to be no depiction of privacy-protected activity. Applicant was never depicted in consultation with his medical provider and no depiction of the examination appears at all. He simply walks from his car to the entrance of the building with a cane. Nothing else is shown.

Thus, there does not appear to be any violation of subsections (a) or (b) of Section 1708.8 at all.

Next, even assuming an intrusion is shown under section 1708.8, the next part of the analysis is whether this defendant is exempt from the statute under sub-section (g.) As quoted above, this subsection exempts entities, whether public or private that are investigating either a crime, a fraud, a violation of statute or the violation of an administrative regulation. Here, there are ample statutes and administrative regulations at play in any workers compensation case. First and foremost, the medical – legal evaluators are charged with determining the periods of temporary disability under Labor Code §§ 4650 and 4657, among other statutes. Also, the medical – legal evaluators also determine the percentage of permanent disability under Labor Code §§ 4660, 4660.1 and 4662. Under Labor Code § 4628, they are required to take a detailed history but the history is only taken from the applicant's point of view. Defendant has a right to check the history for accuracy so that the doctor has an accurate basis for his or her conclusions in determining the periods of temporary disability and the level of permanent disability.

Also, subsection (g) of Civil Code § 1708.8 provides that in order to qualify as an entity, public or private, entitled to conduct more intrusive surveillance in violation of subsections (a) and (b) subsection (g) provides that the party conducting surveillance must first have had an "articulable suspicion" that the product of the surveillance would impact the crime, fraud, statute or administrative rule. Here, the case had already been tried under circumstances where the applicant claimed that his prior attorney and the interpreter failed to fully explain the prior Compromise and Release. Also in that trial, the applicant's prior attorney and the interpreter contested applicant's view that the explanation was incomplete. Thus, there was an issue of fact at the prior trial that called applicant's credibility into question. Now it is true that the trial judge in that case found all three of these witnesses credible. However, while the undersigned may certainly imagine a logical explanation for all three being credible, such would be surmise or speculation. The only firm conclusion is that the applicant's credibility was called into question after the filing of the opposition to the Petition for Reconsideration by defendant.

The term "articulable suspicion" does not appear to be the same as "reasonable suspicion." The latter is used in criminal law cases and is used to determine whether a search warrant is issued or whether a warrantless search is reasonable. Here there is no requirement for a private entity to obtain a warrant to conduct surveillance from a public location. Furthermore, the terminology used appears to be less restrictive to allow for observation on or from public spaces. The word "articulable" means "intelligible" which is not the same as "reasonable." Intelligible means that one can make sense of it rather than the more restrictive "reasonable" that implies a more rigorous logical support for the position.

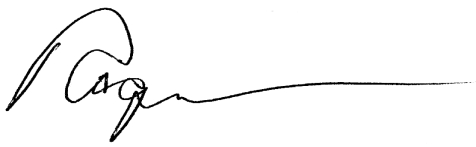
Here, if a witness or party's credibility is in question, a party may have an "articulable suspicion" even if a prior judge found that party to be credible. To simply say, "I don't believe him" is a statement one can make sense of even if there is little or no factual or logical support for it. "Articulable" means "capable or being articulated" according to the Merriam Webster Dictionary. Thus, if the concept can be expressed, it is articulable.

Here, defendant has reason to question the applicant's credibility even where a prior judge found the applicant credible. This would appear to be enough to justify surveillance even if a violation of subsections (a) and (b) of Civil Code § 1708.8 is shown. Here, however, the need to show "articulable suspicion" is not required as the surveillance in this case did not violate subsections (a) or (b) of the statute in question.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,



ROGER A. TOLMAN, JR.
Workers' Compensation Judge

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