WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRIAN DEGEN,

Applicant,

vs.

BONITA UNIFIED SCHOOL DISTRICT; YORK UPLAND,

Defendant.

Case No. ADJ7271474

OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION, GRANTING REMOVAL ON BOARD MOTION, AND DECISION AFTER REMOVAL

Defendant seeks reconsideration of the Findings and Orders of June 2, 2011, in which the workers' compensation judge (WCJ) found that applicant claims to have sustained an industrial injury on March 15, 2010 to his back, right lower extremity and sleep disorder, and that good cause exists to strike any existing reporting of Dr. Jayaraja Yogaratnam, the orthopedic Panel Qualified Medical Evaluator (PQME), and to order the Medical Unit to issue a new orthopedic panel. Pursuant to these findings, the WCJ ordered that "all prior reports of Dr. Yogaratnam prepared in this case are...stricken, meaning that they may not be offered in evidence except at a bifurcated hearing on the issue of Dr. Yogaratnam's entitlement to reimbursement, and may not be forwarded to any other treater or medical expert in this case." The WCJ also ordered that "the Medical Unit shall forthwith issue a replacement QME panel...that does not include Dr. Yogaratnam in the same specialty as the panel issued previously and the parties shall select a physician...in accordance with the law[.]"

Defendant contends, in substance, that "the six second voicemail left for the examiner should not be considered a communication," that the WCJ erred in presuming that the PQME did not intend a "trivial communication," that the POME's deposition fee demand does not give rise to an apparent conflict of interest, and that the WCJ has the authority to reduce the expert witness fee.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation.

We adopt and incorporate the "Facts" (Section II) of the WCJ's Report, which describes the relevant factual and procedural chronology. We do not adopt or incorporate the remainder of the Report.

We will dismiss defendant's petition for reconsideration because it is not taken from a final order. The Findings and Orders of June 2, 2011 is not a final order because it does not finally resolve a substantive issue, e.g., whether or not applicant sustained an industrial injury. (2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, June 2011 Update) § 21.8.)

However, we are persuaded that the WCJ erred in dismissing Dr. Yogaratnam as the PQME on the basis that an ex parte communication occurred. We conclude that there was no ex parte communication. Under Labor Code section 5310, the Appeals Board may remove to itself the proceedings on any claim. We will do so here, in order to ensure that Dr. Yogaratnam continues to serve as the PQME.

In *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575 [75 Cal.Comp.Cases 817, 827-828], the Court of Appeal stated:

> "...[A]n ex parte communication may be so insignificant and inconsequential that any resulting repercussion would be unreasonable. [...] Surely a mere ex parte greeting prior to proceedings or ex parte comment about the weather or traffic would not invoke the remedy under section 4062.3. This being so, neither should a communication unrelated to the case or so peripheral to the operative proceedings as to be insignificant. A certain amount of informality is anticipated in Workers' Compensation Act proceedings. (§ 5708 [the WCJ and WCAB "may make inquiry in the manner...which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division"]; § 5709 ["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"]; see *Northwestern R. Co. v. Industrial Acc. Com.* (1920) 184 Cal. 484, 489 [194 P. 31] ["The Workmen's Compensation Act and the constitution both expressly require the commission to proceed without formality"]; *County of Sacramento v. Workers' Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1116 [92 Cal. Rptr. 2d 290, 65 Cal. Comp. Cases 1] [in the workers' compensation system, "[p]rocedural informality that would make the civil practitioner shudder is normal. But even a 'flexible' system must have structure"].)"

In this case, the WCJ states in his Report that the "facts are not significantly in dispute," including the fact that the November 5, 2010 voice mail message from Dr. Yogaratnam to defendant's claims adjuster requested the adjuster's return telephone call and left no other information. We further note that

defendant informed applicant's attorney immediately following the doctor's voice mail message, and that applicant's attorney did not take any action until after receiving the doctor's report, which as stated in the WCJ's Report is apparently favorable to defendant.[1] Under the circumstances, we conclude that the doctor's voice mail message is so peripheral to the operative proceedings as to be insignificant. Therefore, based on the Court of Appeal's discussion in *Alvarez* as referenced above, we conclude that there was no ex parte communication by Dr. Yogaratnam. We need not and do not address the doctor's fee request in advance of his deposition, as the WCJ states in his Report that the issue "was not determinative of my decision." We agree that the deposition issue is irrelevant to whether or not an ex parte communication occurred. Dr. Yogaratnam shall remain as the PQME in this case, his report is not stricken based on the alleged ex parte communication, and the parties may take the doctor's deposition as provided by law.

For the foregoing reasons,

IT IS ORDERED, that defendant's Petition for Reconsideration is **DISMISSED.**

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[1] The parties and the WCJ should note that we express no opinion whatsoever on any substantive issue in this case, including but not limited to the issue of whether or not applicant sustained an industrial injury.

IT IS FURTHER ORDERED, that removal is **GRANTED** on the Appeals Board's own motion, and that as the Board's Decision After Removal, the Findings and Order of June 2, 2011 is **RESCINDED**, that Dr. Yogaratnam shall continue to serve as the PQME and none of his reporting/proposed deposition testimony is stricken at this time, and that this matter is **RETURNED** to the trial level for further proceedings by the parties and WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

ALFONSO J. MORESI

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 22 2011

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

BEN NAKATAMI
BRIAN DEGEN
FALK & HAMBLIN

ebc

CASE NO: ADJ 7271474

BRIAN DEGEN vs. BONITA UNIFIED SCHOOL DISTRICT, PSI., ADJUSTED BY YORK INSURANCE

WORKERS' COMPENSATION JUDGE: DANIEL DOBRIN

DATE OF INJURY: 3/15/2010

REPORT AND RECOMMENDATION UPON DEFENDANT'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

Date of Decision: 6/2/11

Date of Petition: 6/21/11

Applicant Brian Degen, who was 44 years old on the date of the claimed injury, claimed injury to his back and lower extremity due to lifting heavy objects on 3/15/10.

Defendant's timely, verified and properly served reconsideration petition arises from this judge's order that a new orthopedic QME panel be issued by the Medical Unit and that the prior reporting of PQME Jayaraja Yogaratnam be stricken based on improper ex parte contact with defendant's claims adjuster. Another basis for my decision was that I believed that Dr. Yogaratnam's ex parte communication with the adjuster and insistence on an excessive up-front fee of $850.00 created a conflict of interest which required appointment of a new panel.

On reconsideration, defendant contends it was an abuse of my discretion to interpret a brief voice mail message to defendant's claims adjuster asking her to call back as an impermissible ex parte communication. Defendant argues that other options should

have been pursued besides appointment of a new panel, such as a deposition of the doctor to inquire as to what he wanted from the adjuster or as to the reasonableness of his pre-deposition fee. Defendant also contends that the fee demand did not give rise to a conflict of interest which merited the appointment of a new PQME.

II
FACTS

The matter was set on whether the WCAB should order a replacement orthopedic panel following the reporting of Dr. Jayaraja Yogaratnam, who had previously been the duly selected orthopedic PQME.

The facts were not significantly in dispute. Dr. Yogaratnam evaluated the applicant in his Ontario office on 10/27/10. On 11/5/10, the claims adjuster for the case received a voice mail message from Dr. Yogaratnam himself. As per her declaration placed in evidence in lieu of testimony, "The voice message requested my return telephone call and [left] no other information."

Being conscientious claims professional, adjuster Sherri Williams notified defense counsel, who in turn notified applicant's attorney. Defendant wrote Dr. Yogaratnam on 11/10/10. This letter was copied to applicant's attorney and the letter itself does not appear to be a source of contention. Although the letter was not overly clear as to whether a response was absolutely expected, it noted that ex parte communications were prohibited and advised the doctor to have his office contact the adjuster's office if he had a billing or mechanical question or to advise if the communication was on a substantive issue in which case a conference call would be arranged.

Dr. Yogaratnam issued his report on 11/18/10. Although the report was not placed in evidence, the parties agreed that nothing in the report shed any light on Dr. Yogaratnam's phone call, nor did Dr. Yogaratnam address this concern in any subsequent report. Apparently, the report was favorable to defendant in that the disputed injury claim was found noncompensable.

Applicant's attorney tried to schedule a deposition on 12/1/10. Dr. Yogaratnam's office advised applicant's attorney that he would only set the deposition in his San Bernardino office, a distance of around 25 miles from his Ontario office where the evaluation took place. His office also advised applicant's attorney that he would only schedule the deposition if an $850.00 fee was paid in advance. It was stipulated at trial that defendant was willing to pay this fee.

Instead of going forward with the deposition, applicant's attorney requested a replacement panel from the Medical Unit on 12/2/10 on the same grounds raised herein, namely 1) that Dr. Yogaratnam engaged in impermissible ex parte contact; 2) that he improperly demanded a fee in excess of the $500 allowed under rule 9795. A third claim that Dr. Yogaratnam impermissibly set the deposition in San Bernardino rather than Ontario, where the evaluation took place, is not at issue at this time.

By letter of 1/7/11, the Medical Unit in essence deferred to the WCAB, stating that the issue of ex parte contact was one for a WCJ to decide. As noted above, the issue was tried and submitted before the undersigned based on documentary evidence only, as well as a stipulation regarding the expected testimony of adjuster Williams.

III

DISCUSSION

My best analysis is that reasonable arguments could be made that a removal petition rather than a reconsideration petition is appropriate herein, as the petition deals fundamentally with an interlocutory discovery issue. One could also posit that the choice of doctor was a threshold issue and that therefore a reconsideration petition is proper. However, I don't think this is a major distinction here as I do not believe that defendant has shown either an abuse of discretion or substantial prejudice.

In my opinion on decision, I gave the reasons set forth below for my determination of the issues presented herein. Because I believe that my opinion is largely responsive to the contentions now raised on reconsideration, I am quoting it at length as follows:

"For several different reasons and on several different theories, I have concluded that a new [QME] panel is merited in this matter.

"Very instructive, of course, is the case of *Alvarez v. WCAB*, 75 CCC 817. Although defendant may feel differently, I view the facts in *Alvarez* as quite similar. As in the present case, it is clear that the doctor in *Alvarez* initiated the communication by calling defense counsel to ask that additional records be forwarded. The only real difference I see is that in *Alvarez*, the defense lawyer happened to pick up the phone when the doctor called and in the present matter the doctor got voice mail. *Alvarez* makes quite clear that the courts are not concerned with who initiated the 'communication,' but rather that such communication took place.

"I am satisfied that a clear recorded missive from the doctor that said doctor expected the claims adjuster to call him personally qualifies as a 'communication' within the meaning of section 4062.3 as defined in the *Alvarez* case. I do not question that the defendant and adjuster was 100% blameless, and indeed acted with a great deal of integrity as to this particular issue. Nevertheless, the concern about ex parte contact does not revolve over casting blame but rather protecting the integrity of the PQME process. As the *Alvarez* court pointed out, 'the mere act of inquiring into who initiated the communication or whether the subject of an ex parte communication was substantive or procedural or administrative undermines the appearance of impartiality and the legitimacy of the medical evaluation process.'

"I find it instructive that in the follow-up panel decision to the Court of Appeal's decision in *Alvarez*, the Board determined that the arguably trivial contact therein was consequential enough to justify the appointment of a new panel. As noted by the Board panel in *Alvarez*, 'The fact that the qualified medical evaluator felt comfortable with communicating ex parte with counsel for one party about his purported sources of information might well be disquieting to the other party.' (*Alvarez v. Andromeda Entertainment*, 2010 Cal.Wrk.Comp.LEXIS P.D. 637.) Here, we may never know exactly what the PQME had in mind when he called the adjuster. However, the lack of information here, which the objecting party could only investigate further via a time-consuming deposition at their own time and expense, hardly establishes that Dr. Yogaratnam intended only a trivial communication about the weather or something of that nature. As applicant has pointed out, since the communication took place after the evaluation, it clearly did not pertain to the mechanics of the evaluation itself. If in fact

the communication were a trivial one such as a request for an address, one would think the doctor would have specified the information he was seeking in his voice mail message.

"I would reach substantially the same outcome based on other provisions of the administrative rules. Rule 32.6 gives broad authority for the WCAB to appoint a new panel whenever this is "reasonable and necessary" under LC secs. 4060 et seq. One explicit basis for a replacement panel is that 'The QME has a disqualifying conflict of interest as defined in [rule] 41.5.' (Rule 31.5(a) (13).) Under rule 41.5 (d) (4), such conflict includes 'Any other relationship or interest . . . which would cause a person aware of the facts to reasonably entertain a doubt that the evaluator would be able to act with integrity and impartiality.'

"A number of provisions of the Labor Code and rules prescribe various types of discipline for impermissible ex parte contacts. I would like to emphasize that Dr. Yogaratnam has had no direct input into these proceedings and I reach no conclusions that Dr. Yogaratnam actually misconducted himself. Nevertheless, as applicant pointed out in his trial brief, 'Any attempt to depose the PQME at this point would create a bias with the PQME by making him defensive to prove he did nothing wrong.' Dr. Yogaratnam is now unfortunately in a situation of having a strong incentive to tailor his actions and opinions to show that he is undeserving of any discipline. No matter what happens, the focus of the litigation will be over Dr. Yogaratnam's conduct rather than his forensic opinions. This is one reason that justice is best served in some rare cases by simply starting over with a new panel.

"I also believe a conflict of interest arises from Dr. Yogaratnam's apparent refusal to sit for a deposition except upon payment of an $850.00 fee. If Dr. Yogaratnam's opinions were not so favorable to defendant, one must certainly wonder whether defendant would be so willing to pay an impermissible fee rather than insisting on a new expert. Rule 9794(a) (2) provides that 'The cost of comprehensive, follow-up and supplemental medical-legal evaluations and medical legal testimony *shall be billed and reimbursed* in accordance with the schedule set forth in Section 9795.' As I read section 9795(c), the QME's fee is limited to $250 per hour. Unless Dr. Yogaratnam reasonably expects the deposition and preparation to consume well over three hours, I cannot see how a demand for an $850 advanced fee complies with the dictates of rule 9794(a).

"Again, while Dr. Yogaratnam might have a good explanation of why he demands a fee that appears to violate Board rules, there is definitely the appearance of conflict of interest here as the doctor clearly benefits from issuing pro-defense reports where it is defendant who is ultimately liable for medical-legal expenses under LC sec. 4628. Indeed, one might argue that defendant seems to be a willing participant with Dr. Yogaratnam in breaching rule 9794(a) in order to preserve a favorable opinion, reinforcing that the situation really does create a strong appearance of conflict of interest. I therefore conclude that the fee issue, by itself, also merits appointment of a new panel under rule 31.5(a) (13). "

In reviewing defendant's petition, I must note my disagreement with some of the employer's contentions. The definition of "communication" in Alvarez quoted in the petition is "an expression *or* exchange of information . . . ." [Emphasis added.] While admittedly there was no exchange of information, there was clearly an expression of

information, the same as if Dr. Yogaratnam had sent a letter asking the adjuster to call him rather than using voice mail.

I also disagree that in the *Alvarez* case itself, no new PQME panel was order. The Board panel that decided the *Alvarez* case after remand from the Court of Appeal *did* order a new PQME panel, as noted in the post-appeal *Alvarez* panel decision cited above. (*Alvarez v. Andromeda Entertainment*, 2010 Cal.Wrk.Comp. LEXIS P.D. 637.) The cited panel decision is not directly binding on this judge but it is certainly indicative of the Board's thinking in other cases.

Basically, defendant is asking that a further inquiry be carried out to determine just what the communication of Dr. Yogaratnam was all about. It bears repeating that "the mere act of inquiring into who initiated the communication or whether the subject of an ex parte communication was substantive or procedural or administrative undermines the appearance of impartiality and the legitimacy of the medical evaluation process." (*Alvarez*, supra, 75 CCC 817, 826.) In essence, defendant asks that the parties and the court undertake just such inquiry as the *Alvarez* case would have us avoid. It is also worth noting that under *Alvarez*, "violation of an unqualified prohibition on ex parte communications requires no showing of prejudice to invoke the appropriate remedy." (Id at. P. 827.)

While the *Alvarez* decision has been described as harsh, the remedy for the ex parte contact is a fairly simple one—the parties simply start over with a new PQME panel. In the present matter, this does not impose a great burden where the existing expert has not issued multiple reports or appeared for multiple prior depositions.

The *Alvarez* court's narrow exception for trivial communications about the weather, etc. was simply designed to avoid absurd results, not to compel extensive collateral inquiries into the meaning of unexplained communications such as defendant now proposes.

The issue of the $850.00 deposition fee demand was not determinative of my decision. However, Dr. Yogaratnam's insistence on a large up-front fee after a defense-friendly report hardly inspires confidence herein. CCP section 2034, quoted by defendant, really has nothing to do with this issue herein as that code section deals with a reasonable expert hourly rate. In the present matter, the hourly rate is set by rule 9795(c). I have been alerted to no authority on the subject, but as a workers' compensation practitioner it was always my understanding that an advance fee for a doctor's deposition in a normal case would be based on one hour of deposition time and one hour of preparation time, the current rate being $250 per hour.

The present injury claim appears to be a relatively simple case regarding a disputed specific injury with no apparent lost time, that had been in litigation for less than six months as of the date of Dr. Yogaratnam's evaluation. It does not seem credible that Dr. Yogaratnam reasonably expected the deposition and preparation to take more than three hours of his time. As between what appears to be an opportunistic fee demand and the fact that, throughout the remainder of the case, Dr. Yogaratnam would be partly focused on the facts of the case and partly focused on potential allegations of misconduct herein, I believe I reasonably concluded that there was a conflict of interest requiring appointment of a new panel for the reasons expressed above. Even if we were to involve both sides in a time-consuming inquiry over the appropriateness of the advance fee, that

still would not resolve the other issues discussed above regarding the PQME's prior ex parte communication with the claims adjuster.

IV
RECOMMENDATION

It is respectfully recommended that the defendant's reconsideration petition be denied.

Respectfully submitted,

Daniel A. Dobrin

DANIEL A. DOBRIN
Workers' Compensation Judge

Served on parties listed below

on: 7-5-11

By: L. Fonseca

BEN NAKATANI ARCADIA
FALK HAMBLIN TUSTIN