Kobayashi

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JONATHAN DUONG, ***Applicant,*** **vs.** **AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA; HARTFORD INSURANCE COMPANY OF THE MIDWEST,** ***Defendants.***	**Case Nos. ADJ1479326 (ANA 0411799)** **ADJ7233578** **(Santa Ana District Office)** **OPINION AND DECISION AFTER RECONSIDERATION; ORDER VACATING GRANT OF RECONSIDERATION; ORDER GRANTING PETITION FOR REMOVAL; AND DECISION AFTER REMOVAL**

We previously granted reconsideration in this matter to further study the factual and legal issues in this case. We now issue our decision. Defendant filed a petition seeking removal/reconsideration of the September 16, 2013 Joint Findings of Fact issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial injury to his cervical spine while employed on June 20, 2008.[1] The WCJ also found that defendant obtained the sub rosa video in violation of posted signs prohibiting entry into private property and/or videotaping and that all such sub rosa video is excluded from evidence and may not be forwarded to any examining physician in this case. In the Opinion on Decision, the WCJ stated that "[w]hether or not the defendant has violated [Civil Code section 1708.8] is outside the jurisdiction of the Appeals Board. However, by the defendant's own testimony, the videotaping on private property and in the face of the prohibitory signs which were clearly posted was at a minimum a violation of the posted rules of the properties where the filming took place."

Defendant contends that the WCJ's decision to exclude the sub rosa video will cause it to suffer significant prejudice and irreparable harm because the subject video may have a material effect on the

[1] The June 6, 2013 Minutes of Hearing and Summary of Evidence (MOH/SOE) reflect that the parties stipulated that, in Case No. ADJ7233578, applicant claims to have sustained industrial injury to orthopedic body parts and psyche while employed during the period from September 5, 2000 to August 8, 2008.

merits of applicant's claim. Defendant argues that the WCJ exceeded her authority in excluding the sub rosa video without legal authority, that signs restricting the ability to take sub rosa videotape placed by private property owners do not necessarily govern the situation or create a reasonable expectation of privacy for applicant, and that Civil Code section 1708.8 permits defendant to procure sub rosa video in the manner that was used in this case.

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

Based on our review of the record and for the reasons discussed below, we will vacate our grant of reconsideration, grant removal, rescind the WCJ's decision and substitute it with new Findings and Order finding that the sub rosa video is admissible and ordering that it may be provided to any medical-legal evaluator or treating physician.

On October 11, 2012, defendant filed a Declaration of Readiness to Proceed (DOR) asserting that "DEFENDANT HAS SURVEILLANCE TO SHOW TO QME, DR. GREENZANG. APPLICANT OBJECTS. EXCHANGES OF CORRESPONDENCE, LAST ON SEPTEMBER 21, 2012, HAVE FAILED TO RESOLVE ISSUE. PER LABOR CODE 4062.3(2)(B) AND TITLE 8, CCR SECTION 35(D), A WCAB ORDER IS NECESSARY TO RESOLVE ISSUE." (Original in caps.)

The discovery dispute was tried on June 6, 2013. The sole issue framed for trial was defendant's request for an order permitting defendant to provide the surveillance videos to Dr. Greenzang or other medical-legal evaluator, pursuant to Qualified Medical Evaluator Regulation 35(d).[2] Applicant asserted that the films violate his right to privacy and, therefore, are not admissible and should not be provided to the doctors.

The June 6, 2013 Minutes of Hearing and Summary of Evidence (MOH/SOE) summarizes the trial testimony of several witnesses as follows:

Richard Blaum testified that he works for Alias Confidential Investigations (ACI), that he

[2] Regulation 35(d) states that, "If the opposing party objects within 10 days to any non-medical records or information proposed to be sent to an evaluator, those records and that information shall not be provided to the evaluator unless so ordered by a Workers' Compensation Administrative Law Judge." (Cal. Code Regs., tit. 8, § 35(d).)

conducted surveillance of the applicant by following him first along the street and later by entering the driveway to the Town & Country Mobile Home Park; that he entered and parked in the visitor parking space; that he entered onto the property three times and each time parked in the same location; that he filmed applicant entirely from the car; that there were no signs regarding private property or trespassing that he observed from the street when he entered the driveway; and that he understood that the Town & Country Mobile Home Park was not applicant's place of residence. (MOH/SOE, 6/6/13, at pp. 3-4.)

Applicant testified that his adoptive father drove him to the Town & Country Mobile Home Park and parked in a carport next to his home; that he was also filmed inside of an Albertson's grocery store located at Brookhurst and Edinger; and that his adoptive father drove him to take the picture received as Exhibit 1. (MOH/SOE, 6/6/13, at pp. 5, 7.)

Charles Franklin Covey testified that he owns a home at the Town & Country Mobile Home Park; that there are two signs at each entrance that read "Invitees and Guests Only. No Trespassing. Violators will be Prosecuted;" that there are also signs that say "Private Property;" that he did not invite the investigator onto the property; that he does not know if anyone else invited the investigator; that he did not give permission to the investigator to film on the property; that he did invite applicant to visit his property; that he is applicant's adoptive father; that his unit is the fifth mobile home from the street; and that there is guest parking as you enter into the park from the street. (MOH, 6/6/13, at pp. 6-7.)

Anthony William Gubler testified that he is the owner of ACI; that he received an assignment from Sedgwick CMS on this case; that the assignment sheet stated that the applicant was claiming injury to his entire body, that he was not driving at all, and that he was not active except to go to church; and that he understands that he cannot take film on private property and instructs his investigators of this. (MOH, 6/6/13, at pp. 6-7.)

The only evidence admitted at trial is a photograph containing an Albertson's logo and the words, "NO Videotaping, Photography, Audio Taping, anywhere on store premises without prior consent. For consent call 1-208-395-6392." (Applicant's Exhibit 1.)

The sole basis for the WCJ's decision to exclude the sub rosa video was that "the filming was accomplished in a manner that violated the rules of both properties and the surveillance company itself."

(Opinion on Decision, at p. 3.) In her Report, the WCJ reiterated the reasons given in the Opinion on Decision and added that "there is an important policy consideration to be factored in where the evidence is obtained in a manner which violates posted rules and company policies." (Report, at p. 4.) However, the WCJ did not define or elaborate further on the "policy consideration" involved or explain how it was to be "factored." Based on our review of the record, we disagree with the WCJ's decision to exclude the sub rosa films for the reasons stated below.

First, the WCJ did not identify any legal authority for her decision to exclude the sub rosa video. Pursuant to Labor Code[3] section 5903(a), a WCJ may not act without or in excess of his or her powers as expressly or implicitly authorized by statute or case law. (Lab. Code, § 5903.) An unidentified policy consideration without reliance on statutory or precedential case law authority cannot be the basis for a decision under section 5903.

Second, applicant did not establish any statutory restriction that prevents defendant's private investigators from obtaining sub rosa video in apparent violation of rules posted by private property owners. (Cf. Lab. Code, § 435 (prohibiting employers from making video recordings of employees in limited circumstances); Pen. Code, § 647(j) (prohibiting secret videotaping of persons in various stages of undress).) We are not persuaded by the argument that defendant violated Civil Code section 1708.8[4] (the so-called "anti-paparazzi" statute), where subsection (g) creates an exception for private investigators attempting to capture surveillance video of suspected fraudulent conduct. More importantly, Civil Code section 1708.8 addresses civil tort liability for the invasion of privacy. The proceedings before us do not pertain to civil tort liability but rather the admissibility of evidence before the Appeals Board. Therefore, Civil Code section 1708.8 appears to be inapplicable.

[3] All further statutory references are to the Labor Code, unless otherwise noted.

[4] Civil Code section 1708.8 states that, "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."

Third, we do not agree that applicant had a reasonable expectation of privacy in either the parking lot of the Town & Country Mobile Home Park or inside of Albertson's. 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 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].) More specifically, an individual does not have a reasonable expectation of privacy in the common parking area of an apartment building (see *People v. Szabo* (1980) 107 Cal.App.3d 419, 428-429 [165 Cal.Rptr. 719, 723-724]) or in areas of commercial premises that are open to the public. (*People v. Doty* (1985) 165 Cal.App.3d 1060, 1066 [212 Cal.Rptr. 81].)

In this case, the private investigator filmed applicant in the parking area of Town & Country Mobile Home Park and inside an Albertson's grocery store. Applicant did not reside at the Town & Country Mobile Home Park but was there visiting his adoptive father. There is no evidence that Town & Country Mobile Home Park is a gated community, that the general public is excluded such as by the use of a gate or security, or that the parking area is somehow shielded from view of the street. It is true that

applicant's adoptive father testified that there are posted signs at each entrance. One signs states, "Invitees and Guests Only. No Trespassing. Violators will be Prosecuted." The other sign states, "Private Property." However, these signs were presumably posted for the protection of property owners and/or residents of the Town & Country Mobile Home Park and not for the benefit of applicant who does not own property or reside there. Therefore, the signs do not create a reasonable expectation of privacy for applicant. This is especially true where members of the public can freely drive into the common parking area and where the parking area of the home he was visiting was only five (5) houses from the street.

We find even less expectation of privacy at Albertson's where applicant was filmed in a commercial area open to the public. The Albertson's sign read "No Videotaping, Photography, Audio Taping, anywhere on store premises without prior consent." However, this sign was presumably posted for the protection of Albertson's since the sign explicitly stated that Albertson's could grant consent to film. Thus, applicant failed to establish a reasonable expectation of privacy at either of the two locations.

In addition, we find that any intrusion that may have occurred is justified by a competing interest. The California Legislature has declared that, "Workers' compensation fraud harms employers by contributing to the increasingly high cost of workers' compensation insurance and self-insurance and harms employees by undermining the perceived legitimacy of all workers' compensation claims." (Ins. Code, § 1871(d).) The Legislature also stated that, "Prevention of workers' compensation insurance fraud may reduce the number of workers' compensation claims and claim payments thereby producing a commensurate reduction in workers' compensation costs. Prevention of workers' compensation insurance fraud will assist in restoring confidence and faith in the workers' compensation system, and will facilitate expedient and full compensation for employees injured at the workplace." (Ins. Code, § 1871(d), (e).) Therefore, the investigation of claims is an important function of workers' compensation insurance carriers. (*Teague v. Home Ins. Co.* (1985) 168 Cal.App.3d 1148, 1152 [214 Cal.Rptr. 773, 775-776].) Where an injured employee makes a workers' compensation claim and tenders his or her medical condition in issue, the employee must expect a reasonable investigation by the defendant, including its reasonable efforts to observe the employee's outside activities. In fact, videos that reveal an

applicant's activities and capabilities may be shown to physicians for consideration in the preparation of medical evaluations. (See *M/A Com-Phi v. Workers' Comp. Appeals Bd. (Sevadjian)* (1998) 65 Cal.App.4th 1020 [63 Cal. Comp. Cases 821]; *Griebel v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 255 (writ den.).) This is consistent with the principle that although California's right to privacy extends to medical records (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198; *Hill, supra,* 7 Cal.4th at p. 41), a person who has tendered his or her medical condition in evidence does not have a reasonable expectation of privacy in medical records relating to that medical condition. (*In re Lifschutz* (1970) 2 Cal.3d 415, 423, 433-434.)

We also address applicant's misplaced reliance on the Supreme Court's decision in *Redner v. Workman's Comp. Appeals Bd.* (1971) 5 Cal.3d 83 [36 Cal.Comp.Cases 371]. In *Redner*, a private investigator befriended the injured worker, invited him to a horse ranch, served him alcohol, and then suggested they ride horses. While the injured worker saddled and rode a horse, he was secretly filmed. On the basis of that film, the insurance carrier terminated benefits. Based on these facts, the Supreme Court held that the Appeals Board could not rely on sub rosa video obtained by fraudulent or deceitful inducement of private investigators. However, there are no allegations of fraudulent inducement or deceit on the part of the private investigators in this case. Therefore, we find this case distinguishable and not applicable.

Based on the foregoing, we find that the WCJ should not have excluded the sub rosa video. Thus, we will rescind the WCJ's decision and substitute it with new Findings and Order finding that the sub rosa video is admissible and ordering that it may be provided to any medical-legal evaluator or primary treating physician in this case.

Finally, we note that to properly seek reconsideration, a party must be "aggrieved directly or indirectly by a final order, decision, or award" made and filed by a WCJ or the Appeals Board. (Lab. Code, § 5900(a).) A final order, decision, or award is one that determines a substantive right or liability of those involved in the case. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410].) A WCJ's pre-trial orders regarding

evidence, discovery, and/or trial setting are interlocutory orders which do not determine the substantive rights of the parties, and therefore are not final orders subject to reconsideration. (*California Casualty Indemnity Exchange v. Workers' Comp. Appeals Bd. (Siegwart)* (1979) 44 Cal.Comp.Cases 1112 (writ den.); *Beck v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 190 (writ den.); *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (writ den.).) In this case, the September 16, 2013 Joint Findings of Fact pertains to discovery and the admissibility of evidence but does not determine any substantive right or liability between and/or among the parties. Therefore, it is not a final order. Accordingly, we will vacate our prior grant of reconsideration. We also admonish defendant for filing a Petition for Reconsideration from a non-final order not subject to reconsideration. Defendant's counsel is expected to understand the difference between reconsideration and removal and to only seek the appropriate relief.

Section 5310 grants the Appeals Board jurisdiction to "remove to itself . . . the proceedings on any claim" where relief is sought from non-final orders, decisions or actions that will result in significant prejudice or irreparable harm. (Lab. Code, § 5310; Code Civ. Proc., § 1013; Cal. Code Regs., tit. 8, §§ 10843, 10507.) In this case, we are persuaded that defendant will suffer significant prejudice or irreparable harm by the exclusion of the sub rosa video in question. Therefore, we grant removal, rescind the WCJ's decision and substitute it with new Findings and Order finding that the sub rosa video is admissible and ordering that it may be provided to any medical-legal evaluator or primary treating physician in this case.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that our December 2, 2013 Order granting reconsideration is **VACATED.**

IT IS FURTHER ORDERED that defendant's Petition for Removal regarding the September 16, 2013 Joint Findings of Fact is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board, that the September 16, 2013 Joint Findings of Fact is **RESCINDED** and **SUBSTITUTED** with new Joint Findings of Fact, as provided below.

FINDINGS OF FACT

1. JONATHAN DUONG, born on while employed on June 20, 2008 (Case No. ADJ1479326) at Santa Ana, California, by AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, whose workers' compensation insurance carrier was Hartford Insurance Company of the Midwest, sustained injury arising out of and occurring in the course of employment to his cervical spine.

2. The sub rosa video obtained in the parking area of Town & Country Mobile Home Park and inside Albertsons is admissible.

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IT IS FURTHER ORDERED that the sub rosa video obtained in the parking area of Town & Country Mobile Home Park and inside Albertson's may be provided to any evaluating or treating physicians in this case.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

DEIDRA E. LOWE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 07 2014

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

JONATHAN DUONG
DI MARCO, ARAUJO & MONTEVIDEO
MORROW & MORROW

PAG/sye