Kobayashi - R&R

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALMA LOPEZ CASTANEDA, ***Applicant,*** **vs.** **FOREVER 21; NEW HAMPSHIRE INSURANCE, administered by BROADSPIRE,** ***Defendants.***	**Case No.** **ADJ9667162** **ADJ9793109** **(Los Angeles District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant, Forever 21, by and through its insurer, New Hampshire Insurance, seeks reconsideration of the Joint Findings of Fact and Order, issued August 2, 2016, in which a workers' compensation administrative law judge (WCJ) ordered the DWC Medical Unit to issue a replacement QME Panel in Orthopedic Surgery, finding defendant's QME letter dated June 1, 2005 [sic: 2015][1], contains non-medical information properly objected to per Rule 35(d) and constitutes ex parte communication with the QME. The WCJ held defendant's QME letter violated Labor Code section 4062.3(b), as the portion of defendant's QME letter that referred applicant's deposition testimony, to which applicant timely objected, was non-medical information that should have been stricken or brought to the WCJ for adjudication.

Defendant contests the WCJ's determination, arguing first, that there was no ex parte communication to justify ordering a new QME panel, as it served its communication to the QME on applicant's counsel in advance. Second, defendant argues that it did not violate Labor Code section 4062.3(b), as its communication, authorized under Labor Code section 4062.3(e), did not contain non-medical information or records, but referenced applicant's deposition testimony, which the parties had agreed could be provided to the QME. Defendant argues that applicant's objection to statements in defendant's communication was not an objection to non-medical records, but was an objection to

[1] The WCJ's reference in his Joint Finding of Fact to defendant's advocacy letter to the PQME misstated the date. The correct reference is to a letter dated May 25, 2015, and served on June 1, 2015.

defendant's advocacy. Finally, defendant asserts that even if there was a violation, the WCJ exceeded his authority in applying the remedy for ex parte communications.

Applicant has filed an answer to defendant's petition. There is no Report and Recommendation on Petition for Reconsideration as the WCJ is no longer available.

We will deny defendant's Petition for Reconsideration, as defendant's service of its communication on the QME, after it became aware of applicant's objection and after it filed a Declaration of Readiness to resolve the dispute, was a violation of Labor Code section 4062.3, justifying the WCJ's order.

I.

Applicant Alma Lopez Castaneda sustained an admitted industrial injury to her mid and low back on May 2, 2014, and claims to have sustained an industrial cumulative trauma injury over the period June 1, 2012 through September 23, 2014, to multiple parts of her body, including her back, neck, arm and head, while employed as a maintenance worker by Forever 21.

The parties selected Dr. Aubrey Swartz as a Qualified Medical Evaluator to evaluate applicant's claim of injury, and on April 14, 2015, defendant notified applicant that they had scheduled an appointment for a QME evaluation on May 29, 2015.

On May 4, 2015, defendant served applicant's counsel with its QME Position Statement, pursuant to Labor Code section 4062.3(e).

Applicant's attorney responded on May 11, 2015, raising an objection to defendant's "Supplemental to Position Statement" dated May 25, 2015, pursuant to Labor Code section 4062.3(b) and Division of Workers' Compensation Rule 35(d) (Cal. Code Regs., tit. 8, § 35(d)), stating "the Applicant hereby objects to the consideration of nonmedical records and/or information provided in the aforementioned letter." Applicant's attorney further asserted that if defendant did not remove the objectionable portion, "service of the letter will be considered ex parte communication."

Applicant's objection included the redaction by interlineation of the following bolded portion of defendant's May 25, 2015 correspondence addressed to the QME:

> Regarding applicant's claim of specific injury on May 2, 2014 applicant claims injury was to her upper back with a claim of pain down her right

arm on May 2, 2014 per testimony from applicant's deposition dated December 1, 2014, page 35-36 and applicant was released to regular work on May 28, 2015, being discharged, released as cured without ratable disability and applicant never missed any time from work.

On May 26, 2015, defendant filed a Declaration of Readiness to Proceed, raising the following issues for determination:

> Defense attorney contacted Judy Tsai on May 21, 2015 regarding applicant's objection to defendant's supplemental position statement [Exhibit A] Defendant requests court ruling on whether defendant supplemental position statement was a communication not non-medical record or information subject to objection and whether applicant has impeded defendant's right to communication and conduct discovery. Defendant petitions sanctions, attorney fees and costs for applicant's impediment of defendant's right to discovery.

Before the matter could be set for hearing on defendant's Declaration of Readiness, defendant served its Supplemental Defendant's PQME Position Statement on the QME on June 1, 2015, without removing the portion to which applicant objected.

On August 21, 2015, applicant filed a Petition for Penalties and Request to Strike PQME Report of Dr. Swartz, contending that though defendant received applicant's objection to the inclusion of non-medical information in defendant's supplemental position statement, defendant refused to remove the objected to portion. Applicant further contended that defendant's inclusion of the objectionable information constituted an ex parte communication with the QME and requested that the QME report be stricken.

The QME evaluation by Dr. Swartz proceeded on May 29, 2015, and his report of that evaluation was served on the parties on June 29, 2015.

A hearing was held on April 21, 2016, on the following issues:

> Whether defendant's positional letter dated June 1, 2005 [sic] is a communication and not considered prohibited ex-parte non-medical information pursuant to Labor Code section 4062.3(e)
>
> Whether the defendant's June 1, 2015 PQME position statement is ex-parte communication under Labor Code section 4062.3 and Title 8 California Code of Regulations sections 35(c) and 35(d).
>
> Whether the applicant is entitled to a replacement orthopedic Panel QME evaluation.

The matter was submitted on submitted evidence and the parties' briefs. The WCJ issued his Joint Findings of Fact and Order on August 2, 2016, concluding that the portion of the position statement to which applicant objected constituted non-medical information and that defendant should have either stricken the language or sought adjudication on the proposed language. The WCJ concluded that because defendant failed to do either, the letter constituted an ex parte communication, which entitled applicant to a new QME.

II.

Defendant asserts that its service of its position statement on the QME, without removing the material to which applicant objected, was not a violation of Labor Code section 4062.3. Defendant argues that there was no prohibited ex parte communication with the QME because it served applicant's attorney with the correspondence 20 days in advance of the QME evaluation, and that its subsequent communication with the QME was also served on applicant's attorney. Defendant further argues that its service of its position statement on the QME was not a violation of Labor Code section 4062.3 because the material in its position statement was not "non-medical records." Defendant argues that the material applicant objected to was a reference to information derived from applicant's deposition transcript, and that applicant waived any objection to the use of statements in her deposition transcript.[2]

Labor Code section 4062.3 provides in relevant part, as follows:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
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> (1) Records prepared or maintained by the employee's treating physician or physicians.

[2] In the Statement of Facts in its Petition for Reconsideration, defendant asserts that "Applicant and defense attorney agreed by telephone conversation that PQME could be served with applicant's deposition transcript. The agreement was memorialized by written communication on May 22, 2015." Defendant further states, on page 5 of its Petition for Reconsideration, that "at trial, defendant offered evidence of agreement between defense attorney and applicant attorney that applicant's deposition could be served upon party's PQME without objection. Defendant referenced this agreement in correspondence dated May 22, 2015 that establishes applicant had no objection to the PQME's receipt of 'non-medical records' in question, the deposition transcript itself." We note that the record does not support defendant's contention, as there is no communication dated May 22, 2015 in evidence, and no evidence of an agreement between counsel to serve the QME with applicant's deposition. However, Dr. Swartz's QME report does contain references to applicant's deposition testimony.

(2) Medical and nonmedical records relevant to determination of the medical issue.

(b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. **If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator.** Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation. (Emphasis added.)

. . .

(e) All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.

. . .

(g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.

(h) The party making the communication prohibited by this section shall be subject to being charged with contempt before the appeals board and shall be liable for the costs incurred by the aggrieved party as a result of the prohibited communication, including the cost of the medical evaluation, additional discovery costs, and attorney's fees for related discovery.

Division of Workers' Compensation Rule 35(a) specifies the various types of "information" that the claims administrator or employer shall, and the injured worker may, provide to a QME. Subdivision (b)(1) provides, "All **communications** by the parties with the evaluator shall be in writing and sent simultaneously to the opposing party when sent to the medical evaluator, **except as otherwise provided in subdivisions (c),** (k) and (*l*) of this section." (Emphasis added.) Subdivision (c) provides that the party providing medical and nonmedical reports and information to the evaluator shall serve it on the opposing party at least 20 days before the information is provided to the evaluator. Subdivision (d) provides:

> 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. (Emphasis added.)

Thus, pursuant to section 4062.3, both medical and nonmedical records are considered "information." Also, "medical and nonmedical records" applies to letters from attorneys that discuss medical and nonmedical information, particularly where the letter engages in advocacy, as Rule 35(a) includes among the "information" to be provided to an evaluator a "letter outlining the . . . compensability issue(s) that the evaluator is requested to address in the evaluation...." (Cal. Code Regs., tit. 8, § 35(a)(3).)

Section 4062.3(b) provides that "information" a party proposes to provide to a QME shall be served on the opposing party 20 days before the information is provided to the QME, but if the opposing party objects to the consideration of "nonmedical records" within 10 days thereafter, the nonmedical records shall not be provided to the QME. Similarly, Rule 35(c) and (d) provide that information a party proposes to provide to a QME must be served on the opposing party 20 days in advance, but if the opposing party objects to the consideration of nonmedical records or information, the nonmedical records and information shall not be provided to the QME unless so ordered by a WCJ.

Therefore, under section 4062.3(b) and Rule 35(c) and (d), once applicant timely objected to defendant's proposed letter to the QME that contained a discussion of applicant's deposition testimony, i.e., nonmedical information, defendant was prohibited from sending the letter to the QME without first obtaining an order from the WCJ.

Here, defendant filed a Declaration of Readiness to obtain a hearing to address the issue of applicant's objection to the non-medical information in its position statement. But rather than follow the requirement of Rule 35(d), that the "information shall not be provided to the evaluator unless so ordered by a WCJ," defendant did not wait for a WCJ to consider the issue and served the QME with its original, unrevised position statement. Thus, defendant unilaterally determined that applicant's objection was invalid and abandoned its effort to obtain the judicial determination required by Rule 35(d).

The WCJ concluded that defendant's service of the letter over applicant's objection constituted an

ex parte communication prohibited by Labor Code section 4062.3(g), the remedy for which was allowing applicant to obtain a new QME panel.

Defendant's service of its position statement to the QME was not an ex parte communication prohibited by Labor Code section 4062.3(g), since the letter was simultaneously served on applicant's attorney (See *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575 [75 Cal.Comp.Cases 817], telephone call between counsel and a medical evaluator). However, in view of the fact that defendant had prior notice of applicant's objection under section 4062.3(b), it was still a violation of the prohibition against providing "information" in the form of non-medical records. Furthermore, defendant cannot rely upon the "subsequent communication" provision in section 4062.3(e), since defendant knew that the information contained in the communication to the QME was subject to applicant's objection. (See *Trapero v. Workers' Comp. Appeals. Bd.* (2013) 78 Cal.Comp.Cases 183 [writ denied]; service of vocational report on defendant minutes before, and used at, AME deposition violated agreement to agree upon information to be provided to AME.) Applicant was entitled to expect that its timely objection to defendant's intended communication of non-medical information would prevent defendant from communicating that information to the QME unless so ordered by a WCJ.

Accordingly, we are persuaded that the WCJ reached the correct result in ordering the DWC Medical Unit to issue a replacement QME Panel in Orthopedic Surgery, and will therefore deny defendant's Petition for Reconsideration.

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For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration, filed August 19, 2016, is **DENIED**

WORKERS' COMPENSATION APPEALS BOARD

I CONCUR,

KATHERINE ZALEWSKI

DEIDRA E. LOWE

I DISSENT (See Dissenting Opinion),

JOSE H. RAZO

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

OCT 18 2016

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

ALMA LOPEZ CASTANEDA
LAW OFFICES OF RAMIN R. YOUNESSI
LAW OFFICE OF DANIEL K. LEE

SV/*pc*

DISSENTING OPINION

I dissent. I would grant defendant's Petition for Reconsideration and rescind the WCJ's determination that defendant engaged in ex parte communication which entitled applicant to a new QME panel.

First, there clearly was no ex parte communication. Defendant did not unilaterally engage in any direct oral or written communication with the QME. The majority agrees there was no ex parte communication since the defendant's advocacy letter was simultaneously served on applicant's attorney.

The "communication" at issue was defendant's short summary of applicant's deposition testimony. This does not transform defendant's advocacy letter into a "nonmedical record" under Labor Code section 4062.3(a)(2), as it only referenced the deposition transcript and did not purport to provide the actual transcript. While applicant objected to defendant's reference to information derived from applicant's testimony in the advocacy letter it sent to the QME, the letter itself was not a "nonmedical record" subject to objection under section 4062.3(b). There would have been a clear violation of section 4062.3(b) had defendant submitted the deposition transcript over applicant's objection. However, the parties did agree to provide the transcript of applicant's deposition to the QME, as his report discussed applicant's testimony that was relevant to his medical determination. [3]

It is incongruous to find defendant engaged in improper conduct in referencing applicant's deposition testimony in its advocacy letter when the deposition transcript was part of the nonmedical information the parties agreed to provide to the QME. Any potential harm that may have resulted from the QME's review of the letter was minimized by his review of the entire transcript. Further, if the parties have any concern about the impact the advocacy letter had on the QMEs medical opinion, they may set the QME's deposition for further inquiry about this issue. Replacing the QME is not the proper remedy in the absence of a prohibited ex parte communication.

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[3] I note the observation in the majority opinion that the record does not contain the May 22, 2015 correspondence cited in the Petition for Reconsideration as evidence of the parties' agreement to provide applicant's deposition transcript to the PQME. However, applicant does not challenge defendant's allegation of an agreement in her Answer and the QME report lists the deposition transcript as information provided by the parties.

Accordingly, I would grant defendant's Petition for Reconsideration and would rescind the WCJ's Joint Findings of Fact and Order.

WORKERS' COMPENSATION APPEALS BOARD

JOSE H. RAZO, COMMISSIONER

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

OCT 18 2016

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