WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANDREW CALICA, ***Applicant***

vs.

MICHAELS STORES; GALLAGHER BASSETT SERVICES, ***Defendants***

Adjudication Number: ADJ9223005
Long Beach District Office

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

Applicant seeks reconsideration,[1] or in the alternative, removal, in response to the Findings and Orders re Discovery Trial (F&O), issued by the Workers' Compensation Administrative Law Judge (WCJ) on February 14, 2024. The WCJ determined, in relevant part, that defendant did not breach the stipulation between the parties with respect to the transmission of medical information to Behrooz Bernous, Ph.D.

Applicant avers that defendant conspired to improperly provide neuropsychiatric testing materials to an unlicensed third party, violating the stipulation entered into by the parties.

We have received an Answer from defendant. The WCJ has filed a Report and Recommendation on Petition for Reconsideration and, in the alternative, Removal (Report), recommending that we dismiss the Petition to the extent it seeks reconsideration, and deny the Petition to the extent it seeks removal.

We have considered the allegations of the Petition and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will dismiss applicant's petition for reconsideration, grant the petition as a petition for removal, and amend the decision to find that

[1] Deputy Commissioner Ingels, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

the sharing of applicant's medical information with persons other than Behrooz Bernous, Ph.D., violated the July 22, 2022 discovery stipulation.

BACKGROUND

Applicant asserts defendant breached a stipulation reached by the parties regarding a discovery dispute. The stipulation is set forth in a July 22, 2022 joint letter to the WCJ, requesting that a pending trial regarding a discovery dispute be taken off calendar, as follows:

> This matter is set for a trial before your Honor on Monday, July 25, 2022 at 8:30 am. The parties are jointly requesting the trial to be taken off calendar as there is an agreement to have Dr. Fernando Gonzalez's records, notes, and raw data be sent to Dr. Bernous at Newport Executive & Forensic Consultants Corporation. Should Dr. Gonzalez refuse to send the records, the parties stipulate that there is no opposition to an Order Compelling production of the records notes, and raw data to a medical professional.
>
> (Ex. 24, Joint Letter dated July 22, 2022.)

The letter contains an additional handwritten statement below the typed text as follows:

> Parties stipulate that Dr. Bernous will maintain the confidentiality of these records, will refrain from dissemination of the testing materials to any other party, including the attorneys on this case, and will destroy the records at the completion of the case.
>
> (*Ibid*.)

However, applicant later learned that Dr. Bernous was not a licensed psychologist and alleged a breach of the agreement. (Minutes of Hearing and Order (Minutes), dated July 12, 2023, at p. 2:5.) In addition, it appears that Dr. Bernous shared the data and consulted with a licensed psychologist in the same office, Dr. Richard Lettieri. (*Ibid.*)

On July 12, 2023, the parties proceeded to trial, and framed issues in relevant part of applicant's allegation of "breach of a stipulation between the parties, dated July 22nd, 2022, regarding the transmission of medical information to Behrooz Bernous, Ph.D." (Minutes, at p. 3:5.)

On October 10, 2023, the WCJ vacated the submission, noting the need for clarification as to the scope of the agreement between the parties and the "status" of Richard Lettieri, Ph.D. (Order Vacating Order of Submission for Decision and Notice of Hearing, October 10, 2023.)

On November 22, 2023, the WCJ conducted direct examination of both applicant's counsel and defense counsel and took the matter under submission for decision.

On February 14, 2024, the WCJ issued his F&O, determining in relevant part that "there was no breach of the stipulation between the parties, dated 07/22/2022, regarding the transmission of medical information (raw testing data) to Behrooz Bernous, Ph.D." (Finding of Fact No. 1.) The WCJ determined that the applicant had no right to depose either Behrooz Bernous, Ph.D., or Richard Lettieri, Ph.D. (Findings of Fact Nos. 2 & 3.) Finally, the WCJ determined that "the WCAB does have jurisdiction, limited to these proceedings before the WCAB, to determine if any fraud occurred regarding the stipulation between parties as set forth in Issue #1 and it is found that there is no identifiable fraud that occurred." (Finding of Fact No. 4.) The WCJ's Opinion on Decision observed:

> It is undisputed by the parties that they entered into a written agreement on/about 07/22/2022 to allow the transmission of the psychological raw data testing in the possession of Fernando Gonzalez, Ph.D. to Behrooz Bernous, Ph.D. of Newport Executive & Forensic Consultants. Though Dr. Lettieri also participated in the forensic analysis with Bernous, this does not constitute a breach of the agreement. The agreement was to get the testing data to defendant's Evidence Code Sec. 720 experts in order for them to prepare for part two of Dr. Gonzalez deposition. That is all. No harm or damage has been visited upon applicant as a result and there is no bona fide reason presented by applicant to violate the defendant's privileged status of the forensic experts under Sec. 720. All of applicant's assertions, especially about protecting applicant's privacy rights and such is misplaced. It is simply irrelevant at this juncture and it bears pointing out that all the time and resources spent on these issues would not have likely occurred if due diligence had been exercised in the first instance. After the fact is insufficient and too late.
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> (Opinion on Decision, at pp. 1-2.)

Applicant's Petition contends "the WCJ's decision improperly permits sensitive neuropsychologist testing materials to be sent to an unlicensed person, Mr. Bernous, whom the defense conspired with to hold him out as a licensed neuropsychologist and who did not disclose to Dr. Gonzalez that he was not licensed." (Petition, at p. 7:5.) Applicant also contends that "the WCJ's decision, finding that no breach occurred, improperly relieves Defendants of the binding stipulation they entered without any showing of good cause and in contravention to established case law." (*Id.* at p. 7:8.) Applicant's Petition asks us to rescind the WCJ's determination of no breach, and substitute a finding that defendant breached the joint stipulation, at which time

"[a]pplicant's counsel would bring a petition to disqualify defense counsel because they have acquired information and knowledge from Mr. Bernous and Dr. Lettieri due to their breach of the 7/22/2022 stip[ulation]." (*Id.* at p. 8:1.)

Defendant's Answer avers the intention of the parties as evidenced in the language of the stipulation was "to have the records sent to Dr. Bernous at Newport Executive & Forensic Consultants," and that the agreement did not specify that the recipient had to be a licensed neuropsychologist. (Answer, at 5:25.) Defendant further asserts that Dr. Bernous and Dr. Lettieri are defense experts, and any deposition testimony sought by applicant would be protected from disclosure by the attorney work product privilege. (*Id.* at p. 8:15.)

The WCJ's Report observes that "based upon the language of the agreement, there was no 'breach' of the agreement when Dr. Lettieri, who works with Dr. Bernous at Newport Executive & Forensic Consultants Corporation the facility where the medical information was sent to, also reviewed the medical information in a collaborative manner as Dr. Lettieri qualifies as a 'medical professional' and is not a 'party' in the matter." (Report, at p. 3.) Accordingly, the WCJ concludes defendant did not violate the terms of the discovery stipulation.

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not

include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's decision solely resolves an intermediate procedural or evidentiary issue or issues, specifically whether a party has breached a discovery stipulation. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and the petition for reconsideration will be dismissed.

To the extent that the Petition addresses the WCJ's discovery order, we will treat the petition as one seeking removal. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra; Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

The dispute at bar involves a stipulation between the parties. A written stipulation is subject to the general rules of contract enforcement and interpretation. (*County of San Joaquin v. Workers' Compensation Appeals Bd.* (*Sepulveda*) (2004) 117 Cal.App.4th 1180, 1184 [69 Cal.Comp.Cases 193]; *Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1214 [96 Cal. Rptr. 2d 168]; *Burbank Studios v. Workers' Co. Appeals Bd.* (*Yount*) (1982) 134 Cal.App.3d 929, 935 [47 Cal.Comp.Cases 832].) The California Supreme Court has stated: "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal.Rptr. 2d 538].)

The F&A finds that there has been no breach of the stipulation, based on the intent of the parties at the time the agreement was entered into. Following trial testimony from counsel for applicant and defendant as to their respective intentions in forming the agreement, the WCJ concluded that agreement was not limited to the words of the agreement. Rather, the WCJ concluded that "the agreement was to get the testing data to defendant's Evidence Code Sec. 720 experts in order for them to prepare for part two of Dr. Gonzalez deposition." (Opinion on Decision, at p. 1.)

However, it has been the law in California since 1872 that so long as the language of a contract is clear and explicit, and does not involve absurdity, "the *language* of a contract is to govern its interpretation." (Civ. Code, § 1638, italics added.) Thus, we need not look beyond the terms of the contract, or resort to extrinsic or parole evidence, because the mutual intent of the parties is ascertained from the language of the contract, so long as that language is clear and explicit. (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (*Colamaria*) (2010) 189 Cal.App.4th 101 [75 Cal.Comp.Cases 1123, 1130] (*Colamaria*).)

Here, we are persuaded that the language of the agreement leaves little room for ambiguity. The stipulation specifies that the parties have agreed to submit Dr. Gonzalez' records, notes and raw data to Dr. Bernous. (Ex. 24, Joint Letter dated July 22, 2022.) The agreement makes no provision for Dr. Bernous to share that information with other psychologists. The agreement makes no provision for the information to be forwarded to a medical or consulting group generally – the agreement is specific to Dr. Bernous. The agreement makes no provision for sharing of the information between multiple individuals as part of a collaborative process. Rather, the agreement specifies the records, notes and raw data will be forwarded only Dr. Bernous, and further specifies that Dr. Bernous will "maintain the confidentiality" of the materials and will "refrain from dissemination of the materials to any other party." (*Ibid*.)

Thus, the sharing of Dr. Gonzalez' records, notes and raw data with other persons exceeds the intent of the parties as evidenced by the plain language of the agreement. (*Colamaria, supra*, 189 Cal.App.4th at p. 111.)

We are also mindful that notwithstanding the filing of a claim for workers' compensation benefits, applicant maintains a 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.) California's constitutional right to privacy "extends to…medical records." (E.g., *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198 [45 Cal. Rptr. 3d 316, 137 P.3d 153] (John B.); see also, e.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (*Hill*).)

Additionally, a patient enjoys a privilege to refuse to disclose any "confidential communication" between himself and a treating physician or psychotherapist pursuant to Evidence Code sections 990 et seq. (physician-patient privilege) and 1010 et seq. (psychotherapist-patient

privilege). However, Evidence Code sections 996 and 1016 provide an exception to the general physician-patient and psychotherapist-patient privileges, the "patient-litigant" exception, providing in relevant part that "[there] is no privilege…as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by…[the] patient." (Evid. Code §§ 996(a); 1016(a).)

"[I]n determining whether one has waived the right of privacy by bringing suit, our Supreme Court has noted that although there may be an implicit partial waiver, the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014 [9 Cal.Rptr.2d 331].)

Here, we share applicant's concern regarding the manner in which his neuropsychological testing data has been shared with third parties. On the one hand, it is well-established in California case law that by asserting injury to the brain, applicant has partially waived his right to *privacy as it relates to the claimed injury*. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 863 [143 Cal.Rptr. 695] ["[there] is no privilege . . . as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by . . . [the] patient"].) On the other hand, however, the partial waiver of privilege is not unlimited, and as is noted in *Davis, supra*, the defendant's ability to access and evaluate that information must be narrowly construed so as to minimally abridge applicant's fundamental right to privacy. (*Davis v. Superior Court, supra*, 7 Cal.App.4th 1008, 1014 ["[t]he scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner"].)

However, although we share applicant's concern at the manner in which his personal and psychiatric data has been shared, we do not reach the issue of whether the sharing of this information with unlicensed individuals constitutes a breach of the July 22, 2022 stipulation. This is because we are persuaded in the first instance that the sharing of applicant's neuropsychiatric data with persons other than Dr. Bernous exceeds the terms of the July 22, 2022 stipulation as evidenced by the plain language of the agreement.

Accordingly, we will dismiss applicant's Petition as one seeking reconsideration. We will grant the Petition as one seeking removal, and as our decision after removal, amend Finding of Fact No. 1 to reflect that the sharing of applicant's records, notes, and raw testing results maintained by Dr. Gonzalez with persons other than Behrooz Bernous, Ph.D., constituted a breach of the July 22, 2022 discovery stipulation.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the February 14, 2024 Findings and Orders re Discovery Trial is **DISMISSED**.

IT IS FURTHER ORDERED that the Petition for Removal in response to the February 14, 2024 Findings and Orders re Discovery Trial is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the February 14, 2024 Findings and Orders re Discovery Trial is **AMENDED** as follows:

FINDINGS OF FACT

1. The sharing of applicant's records, notes, and raw testing results maintained by Dr. Gonzalez with persons other than Behrooz Bernous, Ph.D., constituted a breach of the July 22, 2022 discovery stipulation.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 10, 2024

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

ANDREW CALICA
ASVAR LAW
WAI, CONNOR & HAMIDZADEH

SAR/abs

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