WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ADELINA PEREZ, *Applicant*

vs.

KYONG AE YUN and CHONG MYON YUN; and ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11995067
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks removal of the Findings & Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on May 9, 2022. The WCJ found that while employed on March 1, 2019 as a dry cleaning assistant by defendant, applicant sustained injury arising out of and in the course of employment to the head, face, and neck and claims injury to various body parts; that Dr. Marcel Ponton was the medical-legal evaluator pursuant to Labor Code section 4062.3[2]; that his report was obtained in violation of section 4062.3; that his report was struck and inadmissible in all further proceedings. She ordered that Dr. Ponton was replaced as the medical-legal neuropsychological evaluator and that the parties should select a new evaluator to conduct a complete medical-legal neuropsychological assessment.

Applicant contends that Dr. Ponton is a treating physician so that section 4062.3 does not apply; alternatively, that if section 4062.3 does apply, the WCJ did not identify the "ex parte communication" and should have applied the factors in *Suon v. California Dairies* (2018) 83

[1] Commissioner Sweeney was on the panel when we granted reconsideration but no longer serves on the Appeals Board. A new panel member has been appointed in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

Cal.Comp.Cases 1803 (Appeals Board en banc)[3] before ordering that Dr. Ponton be replaced; and that the WCJ should be removed pursuant to section 5310.

We received an Answer from defendant. We received a Report and Recommendation (Report) from the WCJ, which recommends that the Petition be denied.

We have considered the allegations of the Petition for Removal and the Answer and the contents of the Report. Based on our review of the record, and as discussed below, we will rescind the F&O and substitute a new F&O that preserves the finding of injury and finds that Dr. Ponton was a treating physician and that section 4062.3 does not apply to Dr. Ponton's evaluation.

I.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (§ 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision is issued.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

The WCJ's decision here includes inter alia findings of injury and employment, threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Thus, we treat applicant's Petition as one for reconsideration. Although the decision

[3] We note that *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc) addresses the timing of "information" provided to a qualified medical evaluator and objections to the provision of non-medical records under section 4062.3(b).

contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona*, *supra*.)

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).)

Our decision solely resolves an intermediate procedural and evidentiary issue involving the issue of whether section 4062.3 applies to Dr. Ponton's reporting. Our decision does not determine any substantive right or liability and does not determine a threshold issue. We are, however, persuaded that substantial prejudice or irreparable harm will result if the Petition is denied and that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

II.

1. Facts

As found by the WCJ in the Findings and Order, the applicant was employed on March 1, 2019, by defendant as a dry cleaning assistant, and sustained injury to her head, face, and neck, and claims to have sustained injuries to her left eye, left ear, vision, teeth, thoracic spine, lumbar spine, right leg, right knee, sleep, psyche, internal, memory, and cognitive. The injury occurred when an automobile crashed through the storefront of applicant's workplace, ran over applicant, and trapped her underneath it.

On February 25, 2020, the applicant's treating physician Dr. Kaisler-Meza completed a Request for Authorization seeking a consultation with neuropsych provider Dr. Robert Perez. The treater also recommended a neuro qualified medical examiner (QME) and a neuropsych QME in approximately six months, after all the testing was completed. (Defendant Exhibit A, Allen Kaisler-Meza, M.D., February 25, 2020, page 8.) Defendant authorized the neuropsych

consultation, and an eleven-page report was issued by Dr. Perez. (Applicant Exhibit 2, Robert Perez, Ph.D., July 20, 2020.)

Dr. Robert Shor was selected as the Neurology Panel Qualified Medical Examiner (PQME), to evaluate the applicant. PQME Shor noted the reporting by Dr. Perez "was not a complete neuropsychological evaluation" and determined "[t]he claimant needs to go back to Dr. Perez or another neuropsychologist for a complete medical/legal neuropsychological assessment and whole-person impairment rating with both the cognitive issues and the psychological issues. The claimant may need a psychiatric QME evaluation." The QME also found in part "the claimant did sustain an open-head trauma with skull fractures and multiple facial fractures with lacerations, all of which were repaired. The claimant has suffered a traumatic brain injury and has post-traumatic head syndrome symptoms of migraine headaches, cognitive difficulties, and mood disorder." (Applicant Exhibit 6, Robert J. Shorr, M.D., September 2, 2020, page 31.)

The parties disputed the return to Dr. Perez, with the applicant seeking a new evaluator for the assessment. The matter proceeded to trial and was submitted with the WCJ issuing decision on July 30, 2021, "that defendant authorize Dr. Marcel Ponton to conduct the medical/legal neuropsychological assessment requested by QME Robert Shorr, M.D." The decision included as finding number four that "Applicant is entitled to elect Dr. Marcel Ponton, a physician within the employer's MPN [medical provider network], for completion of the medical/legal neuropsychological assessment requested by QME Robert Shorr, M.D." The order was not challenged.

Applicant's counsel contacted Dr. Ponton's office to schedule the neuropsychological evaluation, provide contact information and applicant's medical records.

After evaluations on September 27, 2021, and October 3, 2021, Dr. Ponton authored a fifty-page report dated October 25, 2021. (Joint Exhibit 1, Marcel Ponton, Ph.D., October 25, 2021.)

Defendant asserts it first learned of the evaluations with Dr. Ponton when it received an October 4, 2021, PR-2 from the treating physician, which provided "Patient states last week she had a video/telephonic evaluation that was 8+ hours. She is not aware of the specialty of the clinicians, a male and a female. I suspect this was the long awaited Neuropsych test that previously been denied. (I looked up the clinician, it was Dr. Ponton, a neuropsychologist)." (Defendant Exhibit A, Allen Kaisler-Meza, M.D., October 4, 2021, page 2.)

On October 26, 2021, the defendant filed a petition for replacement of neuropsychology medical legal evaluator, arguing a replacement was necessary due to applicant's ex parte communication with Dr. Ponton in violation of section 4062.3(g).

Thereafter on May 9, 2022, the WCJ issued the F&O and, it is from this decision that the applicant seeks removal.

2.

The fundamental purpose of statutory interpretation is to ascertain the Legislature's intent in order to effectuate the law's purpose. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Interpretation begins "with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Watson* (2007) 42 Cal.4th 822, 828.) The plain meaning controls if there is no ambiguity in the statutory language. (*People v. King* (2006) 38 Cal.4th 617, 639.)

In this matter the statutory language is clear. "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." (§ 4062.3(b), emphasis added). "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." (§ 4062.3(e), emphasis added). "Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited." (§ 4062.3(g), emphasis added).

We discern no ambiguity in the language of the statute. The plain language of section 4062.3 limits its application to information and communication with a qualified medical evaluator selected from a panel. Likewise, ex parte communication is only prohibited with an agreed medical evaluator or a qualified medical evaluator selected from a panel.

The record establishes that Dr. Ponton was not selected from a panel but rather was selected from the employer's MPN. (See § 4616, et seq.)

Since it is clear Dr. Ponton was not selected from a panel nor was Dr. Ponton an agreed medical evaluator, it therefore follows that under a plain language reading that section 4062.3 does not apply to Dr. Ponton.[4]

[4] We note that *Suon*, *supra*, 83 Cal.Comp.Cases 1803 concerns QMEs so that it does not apply here.

3.

Here Dr. Perez was a treating "secondary physician" as originally referred by the primary treating physician Dr. Allen Kaisler-Meza. (Cal. Code Regs., tit. 8, §9785(a)(2).) PQME Shorr found "[t]he claimant needs to go back to Dr. Perez or another neuropsychologist." (Applicant Exhibit 6, Robert J. Shorr, M.D., September 2, 2020, page 31, emphasis added.) Dr. Ponton replaced Dr. Perez as a treating "secondary physician" selected from the MPN.

It is antithetical to a workers' compensation benefit delivery system to restrict applicant's communication with a treating physician or secondary physicians when seeking treatment. Applying ex parte prohibitions on such communications would be cumbersome, delay treatment and run afoul of the constitutional mandate to provide "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury" and to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character". (Cal Const, Art. XIV § 4, emphasis added.)

Section 4062.3 did not apply to Dr. Ponton, and thus, applicant's communication with Dr. Ponton did not and could not violate the ex parte prohibition in section 4062.3. Further, since section 4062.3(g) does not apply, and as explained below, we see no reason to strike Dr. Ponton's reporting.

4.

Generally, the Appeals Board is broadly authorized to consider the reports of attending or examining physicians. (§ 5703(a)(1); *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal. 4th 1231, 1239 [78 Cal. Comp. Cases 1209] (*Valdez*).) The weight accorded the evidence, including the weighing of medical-legal reporting in evidence, is a matter to be determined by the WCJ and by the Appeals Board. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312. 317 [35 Cal.Comp.Cases 500]; *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656].)

Even in instances where a WCJ or the Appeals Board has determined that a report has limited or no evidentiary weight with respect to the medical-legal conclusions reached by the evaluating physician, or because of other procedural or substantive deficiencies, the report may nonetheless contain information relevant to the determination of issues necessary to the adjudication of the claim. Moreover, admission of the reporting is consonant with well-established principles favoring the broad admissibility of evidence in workers' compensation proceedings.

Indeed, "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' Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178 [73 Cal.Comp.Cases 763].)

Similarly, the Appeals Board is broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a); *Valdez, supra*, at p. 1239.) Section 4064(d) provides that no party is prohibited from obtaining *any* medical evaluation or consultation at the party's own expense, and that *all* comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in specified statutes. (§ 4064(d); *Valdez, supra,* at p. 1239.) Taken together, these case law and statutory prescriptions underscore the importance of allowing for the full consideration of the entire evidentiary record, in furtherance of the substantial justice required in workers' compensation proceedings.

5.

PQME Shorr found applicant suffered a traumatic brain injury and has post-traumatic head syndrome symptoms of migraine headaches, cognitive difficulties, and mood disorder. As part of treatment within the MPN, applicant underwent two neuropsychiatric evaluations. The most recent evaluation resulted in a report of fifty-one pages prepared after a video/telephonic evaluation that was 8+ hours.

Thus, since section 4062.3 does not apply and Dr. Ponton's reporting should not have been struck, substantial prejudice or irreparable harm will result to applicant if removal is denied. Moreover, applicant's further cognitive evaluation and treatment could be improperly seen as having moved from the MPN treatment environment to the PQME evaluation process. We further conclude on these facts that reconsideration will not be an adequate remedy if the matter ultimately proceeded to a final decision adverse to applicant.

III.

We observe that "[i]t is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Board en banc).) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the

decision." (*Hamilton*, supra, at p. 475.) WCAB Rule 10759, states, in pertinent part: "Each exhibit listed must be clearly identified by author/provider, date, and title or type (e.g., "the July 1, 2008 medical report of John Doe, M.D. (3 pages)"). Each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate "document" and must be listed as a separate exhibit". (Cal. Code Regs., tit. 8, § 10759(c), emphasis added.)

Although presently sufficient for review, we note the record contains three exhibits identified as 1, (two applicant's exhibit 1 and one joint exhibit 1), and two exhibits each identified as 2, 3, A and B. The use of the same identifier for each proponent's exhibits makes meaningful review of a decision difficult. This identification anomaly is likely the result of the two separate trial submissions. In any further proceedings the WCJ is to uniquely identify each joint and proponent exhibit sequentially to avoid confusion.

Accordingly, we rescind the F&O and substitute a new F&O that preserves the finding of injury and finds that Dr. Ponton was a treating physician and that section 4062.3 does not apply to Dr. Ponton's evaluation.

Based on the above discussion regarding the broad admissibility of medical evidence in workers' compensation proceedings, we do not believe that there is a basis to strike Dr. Ponton's reporting. However, we make no finding as to admissibility since the admissibility of the reporting in the capacity of a treating physician was not an issue raised at trial.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of May 9, 2022, is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Adelina Perez, while employed on March 1, 2019, as a dry cleaning assistant, in San Jose, California, by Kyong Ae Yun and Chong Myon Yun, sustained an injury arising out of and arising in the course of employment to the head, face, and neck and claims to have sustained injury arising out of and in the course of employment to the left eye, left ear, vision, teeth, thoracic spine, lumbar spine, right leg, right knee, sleep, psyche, internal, memory, and cognitive.

2. On the date of injury, the employer's workers' compensation insurance carrier was Zenith Insurance Company.

3. Dr. Ponton is a treating physician and not a medical-legal evaluator as defined under Labor Code section 4062.3.

4. Labor Code section 4062.3 does not apply to Dr. Ponce's evaluation and reporting.

ORDER

Dr. Ponton shall continue as the medical-legal neuropsychological evaluator in accordance with the WCJ's order of July 30, 2021.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 25, 2025

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

ADELINA PEREZ
THE LAW OFFICE OF ARASH KHORSANDI
CHERNOW AND LIEB

PS/oo

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