WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ARIEL PRUDENTE, *Applicant*

vs.

RJP FRAMING, INC. and ALASKA NATIONAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ13119496
Lodi District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks removal of the November 20, 2024 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that Dr. Peter Turek be replaced as the psyche panel Qualified Medical Evaluator (QME) due to applicant's apparent violation of Labor Code[1] section 4062.3(b) when applicant's attorney simultaneously provided defendant and Dr. Turek with email attachments consisting of a medical report from orthopedic panel QME, Dr. Michael Klassen, and "summaries and excerpts from the Kite decisions" with "hand-written notations presumably created by Applicant's Attorney." (F&O, p. 2.)

Applicant contends that the documents were not provided ex parte and do not constitute "information" as understood under section 4062.3(b). (Petition, p. 9.) Applicant further contends that the documents were "not prejudicial to the Defendant," and as such, replacement of Dr. Turek would be excessive as it would subject applicant "to another difficult psychiatric evaluation that could result in another two years of litigation[.]" (*Ibid*.)

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

We have considered the Petition for Removal (Petition) and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the F&O, and return this matter to the trial level for further proceedings consistent with this opinion.

FACTS

Applicant claims that while employed by defendant as a carpenter on February 20, 2020 he sustained an industrial injury to the neck, psyche and left arm, shoulder, hand, and fingers.

The parties proceeded with discovery and retained Dr. Turek as the psychiatric panel QME.

On May 17, 2023, Dr. Turek evaluated the applicant and issued an initial report dated June 9, 2023 wherein he found that the work injury was "the predominant cause of his PTSD." (Exhibit CC, p. 15.)

On August 30, 2023, Dr. Turek was deposed by the parties. Prior to the deposition, applicant's attorney sent Dr. Turek and defendant an email with attachments consisting of a November 12, 2021 report of orthopedic QME, Dr. Klassen, and "summaries and excerpts from the Kite decisions" with "hand-written notations presumably written by Applicant's Attorney." (F&O, p. 2.)

On October 12, 2023, defendant filed a "Petition for Replacement of Panel QME" alleging that applicant violated section 4062.3(b) and that the information provided by applicant's attorney "had a highly prejudicial effect" on Dr. Turek. (Petition for Replacement of Panel QME, October 12, 2023, p. 3.)

On March 27, 2024, defendant filed a Declaration of Readiness to Proceed (DOR) on the limited issue of defendant's petition for a QME replacement panel.

On November 20, 2024, the WCJ issued findings and order that Dr. Turek be replaced as the psyche panel QME due to applicant attorney's "violation of labor code section 4062.3(b)" which rendered Dr. Turek's ability to "remain completely impartial practically impossible." (F&O and Opinion on Decision (OOD), November 19, 2024, p. 3.) It is from this findings and order that petitioner seeks removal.

DISCUSSION

Turning now to the merits of the Petition, section 4062.3 provides guidance as to what is to be served to the opposing party at least twenty days prior to provision to the QME and what may be served simultaneously. Section 4062.3 states, in relevant part that:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
>
> (1) Records prepared or maintained by the employee's treating physician or physicians.
>
> (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.
>
> …
>
> (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.
>
> (f) Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluator. Oral or written communications with physician staff or, as applicable, with the agreed medical evaluator, relative to nonsubstantial matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, do not constitute ex parte communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.
>
> (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.

(Lab. Code, § 4062.3(a)-(b),(e)-(g).)

Pursuant to section 4062.3, the preliminary question to be answered is whether the documents or materials sent to the QME constitute "information" or "communication." In *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136 (Appeals Bd. en banc), we distinguished "information" from "communication" as follows:

> 1. 'Information,' as that term is used in section 4062.3, constitutes (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.
>
> 2. A 'communication,' as that term is used in section 4062.3, can constitute 'information' if it contains, references, or encloses (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.

(*Maxham*, *supra*, at p. 138.)

In the instant matter, less than an hour before Dr. Turek's August 30, 2023 deposition, applicant provided Dr. Turek and defendant with an orthopedic panel QME report from Dr. Michael Klassen as well as attachments consisting of "summaries and excerpts from Kite decisions" with handwritten notations. (F&O, p. 2.) Although the report of Dr. Klassen was already in defendant's possession in excess of twenty days, the *Kite* summaries and excerpts were not. Pursuant to section 4062.3(b) and *Maxham*, it is clear that the summaries and excerpts provided to defendant and Dr. Turek on August 30, 2023 constitute "information" in that they contain nonmedical documents relevant to the determination of medical issues in this case. As such, pursuant to section 4062.3(b), defendant was to be served these documents at least twenty days prior to their provision to Dr. Turek.

With respect to remedies available to the opposing party in instances wherein section 4062.3 is violated, the Labor Code is unfortunately silent. In *Maxham*, we held that:

> If the WCJ determines that applicant improperly provided 'information' to the AMEs, he has wide discretion in fashioning an appropriate remedy for the violation of section 4062.3(c). Because this case does not involve an improper ex parte communication with an AME, removal of that AME may not be warranted.

(*Maxham*, *supra*, at p. 147.)

Taking *Maxham* into account, in *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Bd. en banc), we held in that:

> …the trier of fact similarly has wide discretion in fashioning an appropriate remedy for a violation of section 4062.3(b) pursuant to the Appeals Board's judicial powers to address discovery disputes as discussed above. (citation omitted)
>
> In determining the appropriate remedy for a party's violation of section 4062.3(b), factors the trier of fact may consider include, but are not limited to, the following, as relevant:
>
> 1. The prejudicial impact versus the probative weight of the information.
>
> 2. The reasonableness, authenticity and, as appropriate, relevance of the information to determination of the medical issues.
>
> 3. The timeline of events including: evidence of proper service of the information on the opposing party, attempts, if any, by the offending party to cure the violation, any disputes regarding receipt by the opposing party and when the opposing party objected to the violation.
>
> 4. Case specific factual reasons that justify replacing or keeping the current QME, including the length of time the QME has been on the case. Whether there were good faith efforts by the parties to agree on the information to be provided to the QME.
>
> 6. The constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)
>
> Following consideration of all relevant factors, the trier of fact may determine the appropriate remedy for a violation of section 4062.3(b). Although the trier of fact may conclude that the appropriate remedy is a new QME, the trier of fact may conclude that other relief besides a new QME, or in addition to a new QME, is more appropriate for a party's violation of section 4062.3(b) depending on the circumstances.

(*Suon*, *supra*, at pp. 1815-1816.)

Here, the WCJ ordered that Dr. Turek be replaced as the psyche QME because he found that the information provided by applicant "had a prejudicial effect upon the opinions of Dr. Turek"

thereby rendering his "ability to remain completely impartial practically impossible." (FOF and OOD, p. 3.) Unfortunately, the WCJ failed to provide his rationale in making this decision and did not explain why less drastic measures were not available.

As explained in *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton*, *supra*, at pp. 473, 475.) 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." (*Id.* at p. 475.) This "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Id.* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

It is also well established that the Appeals Board has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 9 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Under both the California and United States Constitutions, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [97 Cal Rptr. 2d 852, 65 Cal.Comp.Cases 805].) A fair hearing is "… one of 'the rudiments of fair play' assured to every litigant …" (*Id.* at p. 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission … must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution

of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses, introduce and inspect exhibits, and offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Accordingly, we grant applicant's Petition, rescind the November 20, 2024 Findings and Order, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the November 20, 2024 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the November 20, 2024 Findings and Order is **RESCINDED**, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 24, 2025

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

ARIEL PRUDENTE
LAW OFFICES OF GUY ALLEN MEDFORD
LAUGHLIN, FALBO, LEVY & MORESI
DONNELL, MELGOZA & SCATES

RL/*cs*

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