WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

PETER PHAM, *Applicant*

vs.

SOUTHERN CALIFORNIA EDISON,
permissibly self-insured, *Defendants*

Adjudication Number: ADJ16326594
Marina Del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Defendant seeks removal in response to a December 12, 2023 Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ), in which the WCJ determined that although applicant sent an email message to the Qualified Medical Evaluator (QME), defendant failed to establish that the message was actually communicated to the QME. Accordingly, the WCJ denied defendant's motion for a replacement QME.

Defendant contends applicant's email to the QME constituted impermissible ex parte contact requiring replacement of the QME.

We have received an Answer from applicant. The WCJ has filed a Report and Recommendation on Petition for Removal, recommending that we deny removal in this matter.

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will grant defendant's petition, rescind the F&O, and substitute new Findings of Fact that the applicant's email communication constituted impermissible ex parte contact, and grant defendant's motion for the issuance of a replacement panel of QMEs.

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 [38 Cal. Rptr. 3d 922, 71 Cal. Comp. Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal. App. 4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 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).)

Applicant alleges he sustained psychiatric injury while employed as a project manager by Southern California Edison from February 11, 2021 to February 11, 2022. The parties have selected Diane Weiss, M.D., as the psychiatric QME.

The parties have stipulated to the following facts:

> On June 22, 2023 applicant had an in-person reevaluation with PQME Dr. Diane Weiss.
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> On June 25, 2023 at 4:15 p.m., the represented applicant sent an email to: dr.dianeweiss.mm@gmail.com, and he did not send a copy to defendant.
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> On June 25, 2023 at 6:20 p.m., applicant sent, to the same email address, an email retracting his email of June 25, 2023 at 4:15 p.m., and he did not send a copy of this second email to defendant.
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> On June 26, 2023 at 11:39 a.m., applicant's attorney sent an email to the same address mentioned above and added defense attorney to the email chain, and applicant's attorney asked the recipient of the original email to ignore it.
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> On July 12, 2023 defense attorney sent out, by U.S. mail, an objection to applicant's attorney, pursuant to Labor Code section 4063(e), that defendant was objecting to applicant's ex parte communication with the office of Dr. Weiss after the evaluation of June 22, 2023. Defendant indicated it was seeking a new evaluation with another psychiatric PQME.

(Minutes of Hearing, dated December 4, 2023, at p. 2:12.)

The parties proceeded to trial on December 4, 2023 and framed for decision the sole issue of "[w]hether defendant is entitled to a Replacement Psychiatry QME Panel pursuant to Labor Code section 4062.3 and California Code of Regulations section 35." (*Id.* at p. 3:7.) The parties submitted the matter for decision on the documentary record.

On December 12, 2023, the WCJ issued his decision. The WCJ observed that Labor Code 4062.3 proscribes ex parte communication with an agreed medical evaluator, and in the event of such communication, the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation. (Opinion on Decision, at p. 3.) The WCJ observed that here, although applicant sent an email to the QME, the evidentiary record did not establish that the QME actually received or read the emails.

> To show that the applicant potentially corroded the PQME process with ex parte communication, per LC4062.3, and/or CCR 35(k), the defendant needs to prove that the email of the applicant Peter Pham of 06-22-2023 reached the eyes or ears of Dr. Diane Weiss, the medical evaluator in this case. This can be shown through direct evidence or reliable circumstantial evidence. One good form of reliable circumstantial evidence is that the information contained in the email of 06-25-2023 at 4:15 p.m. is mentioned in the very detailed and comprehensive report of 171 pages as set out in Joint Exhibit X3. Yet there is no such information in Dr. Weiss' report of 07-22-2023. A more direct method is if Dr. Weiss stated that she reviewed such an email. There is no record of this.
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> In view of the gap in the causal chain of needed evidence, someone could have deposed Dr. Weiss or Ms. Mireya Martinez to simply ask them about their emails from applicant Peter Pham, if any, or their knowledge about these emails. There was no evidence admitted at trial which suggested that this was done. It is left to the WCJ to connect incomplete dots on the evidence chain.
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> It is well established evidence procedure that the party holding the affirmative of an issue has the burden of proof for that issue. For our issue on whether LC4062.3 has been violated and whether this would justify a new psychiatric PQME besides Dr. Diane Weiss, the burden of proof lies with the defendant, who is asserting the affirmative on this issue. There is a critical evidentiary gap here on whether an ex parte message ever reached the "medical evaluator" in this case.

(*Id.* at p. 4.)

The WCJ concludes that the defendant did not meet its burden of establishing to a preponderance of the evidence that applicant's ex parte message was "communicated to a 'medical evaluator' as that term is used in LC4062.3 (e) or (g), and/or the term 'evaluator' as it is used in CCR section 35 (k)." (Findings of Fact, at p. 3.)

Labor Code section 4062.3 sets forth the requirements for providing information to QMEs. The statute provides, in relevant part:

(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.

…

(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.)

Defendant's Petition contends the WCJ erred in considering whether the question of whether applicant's email reached the "eyes and ears" of the QME. Defendant cites to our panel decision[1] in *Giammona v. Fisher Development* (April 21, 2011, ADJ3225136 (OAK 0345446))

[1] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

[2011Cal. Wrk. Comp. P.D. LEXIS 160] (*Giammona*) for the proposition that the appearance of impartiality, rather than prejudice, is the critical consideration in determining whether there has been prohibited ex parte contact.

In *Giamonna*, the parties selected a QME who evaluated applicant and issued three reports. At a subsequent deposition of the QME, the parties discovered that applicant had sent a letter to the QME on the date of the final report without providing a copy to his own counsel or to defense counsel. It did not appear, however, that the QME had reviewed the letter or incorporated it into the body of QME reporting in evidence. Defendant nonetheless petitioned for a replacement QME under section 4062.3(g). We analyzed the issues as follows:

> If a party communicates with the PQME in violation of section 4062.3(e), that is, by an oral communication or by a written communication that is not served, the aggrieved party may terminate the evaluation and seek a new evaluation by another PQME under section 4062.2. (Lab. Code, § 4062.3(f); Cal. Code Regs., tit. 8, §§ 35(b)(1), (c), (d), (g), (k); 41(b); 60(b)(7).) This rule is to be strictly construed because impartiality or appearance of impartiality is crucial. (*Alvarez v. Workers' Compensation Appeals Board* (*Parades*) (2010) 187 Cal.App.4th 575, 589 [75 Cal.Comp.Cases 817] (*Alvarez*).) The analysis of whether a communication is ex parte requires no showing of prejudice. (*Id.* at p. 589; see *State Farm Ins. Co. v. Worker's Compensation Appeals Bd.* (*Pearson*) (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69].)
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> Labor Code section 4062.3(h) provides that sections 4062.3(e) and (f) do not apply to an applicant's oral or written communication in the course of the examination or at the request of the evaluator in connection with the examination … On the face of it, the communication by applicant "in the course of the examination" described in section 4062.3(h) must have occurred during the time that the applicant was in the doctor's office and be made during the examination. Moreover, again by the plain meaning of the statute, if the communication by applicant was not during the examination, the only other exception for a communication by applicant at any other time would be at the request of the doctor in connection with an evaluation.
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> Therefore, in the case of written communication such as applicant's letter, based on sections 4062.3(e) and (f) and *Alvarez*, it must be served on the other side unless the document is within the specific exceptions of section 4062.3(h). Under section 4062.3(h), the document must be prepared by the applicant and must be given to the PQME during the examination or provided at the request of the PQME in connection with the examination.
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> By applicant's own admission, the letter was prepared and sent to the doctor after the examination had concluded, and a copy was not served on defendant.

> Thus, under sections 4062.3(e) and (f), it is an ex parte communication, unless it falls within one of the two exceptions in section 4062.3(h). It is undisputed that the letter was prepared by applicant alone. But, despite applicant's contention that the statute requires that the communication merely have a connection to the examination, the statute also requires that the communication by applicant be in the course of an examination or at the request of the PQME. While the letter does not appear to contain any information that would be different from information that applicant would have presumably provided during the examination and it does not appear that Dr. Jamasbi reviewed the letter in preparing his opinion in his report following the May 26, 2010 examination, there is no exception in the rule for either circumstance. Such an interpretation would require a consideration of substantive content and the influence of the communication on the opinion of the PQME, in direct contradiction to the clear rule in *Alvarez* that prejudice need not be demonstrated and that the appearance of impartiality is crucial. Here, the letter was prepared after the examination was concluded and was not given to the doctor during the course of the examination, and, according to Dr. Jamasbi, the letter was unsolicited by him. Thus, the letter does not fall within the specific exceptions of section 4062.3(h) and must be considered an ex parte communication.

(*Giammona, supra*, 2011 Cal. Wrk. Comp. P.D. LEXIS 160, 9-13.)

Our analysis in *Giammona* observed that section 4062.3 does not allow for equitable consideration and provides only a single exception for communications made during the course of the evaluation. We also followed the reasoning in *Alvarez, supra*, 187 Cal.App.4th 575, wherein the court observed that the primary consideration underlying section 4062.3 is the preservation of the appearance of impartiality in the QME evaluation process and precludes consideration of the substance of an alleged violation or whether the violation resulted in actual prejudice to a party. Accordingly, we granted defendant's petition and ordered a replacement panel of QMEs. (*Ibid*.)

In *Alvarez, supra*, 187 Cal.App.4th 575, the court of appeal considered whether a telephone conversation *initiated by a QME* following an evaluation constituted ex parte conduct. The WCJ determined that because the QME initiated the contact, it was not ex parte, and the WCAB affirmed. However, the appeals court reversed, observing that, "[u]nder the rule proposed by the WCJ and WCAB, the mere act of inquiring into who initiated the communication or whether the subject of an ex parte communication was substantive, procedural or administrative undermines the appearance of impartiality and the legitimacy of the medical evaluation process … [i]t is to avoid such difficulties that section 4062.3 prohibits ex parte communications and mandates that all communications between counsel and the medical evaluator 'shall be in writing and shall be served on the opposing party when sent to the medical evaluator.'"(*Id.* at p. 589.) The court

observed that while judges and arbitrators might be expected to differentiate between procedural and scheduling matters on the one hand and substantive communications on the other, the same could not be expected from medical professionals involved in the medical-legal process. The court observed, "medical evaluators do not have the same background and experience that judges and arbitrators have to draw such distinctions … [i]n a field that is dependent on expert medical opinions, the impartiality and appearance of impartiality of the panel-qualified medical evaluator is critical. Thus, there are justifications for a strict rule prohibiting all ex parte communications in this context." (*Ibid*.)

Here, we believe a similar analysis is applicable. We appreciate the thoughtful analysis of the WCJ with respect to whether defendant has carried its burden of proof in establishing that the QME actually received and read applicant's email. However, pursuant to *Giammona, supra*, and *Alvarez, supra*, the legislature has established only a single, limited exception to the rule prohibiting ex parte conduct for communications made during the course of an evaluation. In so doing, the legislature has declined to make provision for the exact type of analysis that applicant now contends is applicable, i.e., a weighing of the nature or extent of the ex parte contact. It is for this reason that the court of appeal rejected the Board's attempt to differentiate between administrative and substantive communications in *Alvarez*, concluding rather that "[w]hen ex parte communications are not unqualifiedly prohibited, prejudice may need to be shown to invoke a remedy … [but] whether a party is an 'aggrieved party' under section 4062.3 has nothing to do with prejudice. It is concerned with whether the party has standing and is a proper party to seek review." (*Alvarez, supra*, 187 Cal.App.4th 575, 589.) Accordingly, the question of whether the QME reviewed the ex parte communication is not germane to our analysis. This is because "[s]uch an interpretation would require a consideration of substantive content and the influence of the communication on the opinion of the PQME, in direct contradiction to the clear rule in *Alvarez* that prejudice need not be demonstrated and that the appearance of impartiality is crucial." (*Giammona, supra*, 2011 Cal. Wrk. Comp. P.D. LEXIS 160, p. 13.)

Here, the parties have stipulated that applicant sent an email to the office of the QME on June 25, 2023 at 4:15 p.m., and did not transmit a copy of the communication to the opposing party. (Lab. Code, § 4062.3(e),(g).) There is no colorable assertion that the exception for direct communications made during the course of the QME evaluation are applicable on these facts. (Lab.

Code, § 4062.3(i).) Accordingly, applicant's email was ex parte contact proscribed by section 4062.3(g).

Because the analysis of prejudice to the parties is not a relevant consideration in the evaluation of ex parte contact under section 4062.3, we will grant defendant's petition and rescind the December 12, 2023 F&O. We will substitute a new Findings of Fact that applicant's June 25, 2023 email constituted ex parte contact with the Qualified Medical Evaluator and order the DWC Medical Unit to issue a replacement panel of QMEs in the specialty of psychiatry.

Defendant further requests that we strike the entirety of the reporting of Dr. Weiss from the evidentiary record. (Petition, at p. 8:6.) In most instances, however, deficient medical-legal reporting should remain in evidence, and should be accorded the appropriate evidentiary weight unless there is a specific statutory basis for their exclusion. 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].) All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. (Lab. Code, § 3202.5.) Thus, even in instances where a WCJ determines 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. Examples of relevant information may include a record of presenting symptoms, medical histories, a review of medical records that later become lost or otherwise unavailable, records of diagnostic testing, and clinical observations.

Allowing deficient medical-legal reporting to remain in evidence while assigning it the appropriate evidentiary weight 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." (Lab. Code, § 5703(a); *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209] (*Valdez*).)

Section 4064(d) provides the 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. (Lab. Code, § 4064(d); *Valdez*, *supra*, at p. 1239.) Section 4062.3(a) further provides that any party may provide to the QME, subject to the restrictions set forth in the statute, any records prepared or maintained by the employee's treating physician or physicians and medical and nonmedical records relevant to determination of the medical issue. (Lab. Code, § 4062.3(a).) Finally, WCAB Rule 10682(c) (Cal. Code Regs., tit. 8, § 10682(c)), provides that a failure to comply with the specific minimum requirements set forth under the rule will not render the reporting inadmissible but will instead be considered in the weighing of the evidence. Taken together, these statutory, regulatory, and case law 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.

We acknowledge that in certain instances, QME reporting has been stricken from the record following prohibited ex parte contact. In *Pearson, supra*, 192 Cal.App.5th 51, for example, the court of appeal held that ex parte contact between lien claimant home health provider and the regular physician required the resulting reports issued by the regular physician to be stricken from the record. However, the ex parte contact therein *preceded* the examination of the applicant and the issuance of the contested reporting. In contrast, our panel decision[2] in *Dollemore v. Wayne Perry* concluded that where the ex parte contact occurred only *after* the examination by the QME and the resulting issuance of a report, the QME's reporting that issued prior to the ex parte communication "cannot be said to have been tainted by applicant's later impermissible communication." (*Dollemore v. Wayne Perry* (November 9, 2018, ADJ10452831) [2018 Cal. Wrk. Comp. P.D. LEXIS 528].) We thus declined to strike the QME reporting issued prior to the ex parte contact.

We remain mindful of the reasoning of the court of appeal in *Alvarez, supra*, that the legislature's intent underlying section 4062.3(g) is to preserve the appearance of impartiality. (*Alvarez, supra*, 187 Cal.App.4th 575, 589.) Here, Dr. Weiss issued two reports and testified at deposition testimony prior to the ex parte contact of June 25, 2023, and we discern no compelling reason to strike these reports from evidence. However, we believe it necessary to strike the QME

[2] See footnote 1, *ante*, page 4.

report dated July 22, 2023 because it issued after the ex parte contact, in order preserve the appearance of impartiality and the legitimacy of the medical evaluation process. (*Ibid*.)

In summary, because section 4062.3 prohibits ex parte communications and mandates that all communications between counsel and the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator, and because the issue of prejudice is not applicable to the analysis of whether there has been ex parte contact, we will grant defendant's petition, rescind the F&O, and order the issuance of a replacement panel of QMEs in psychiatry. Because QME Dr. Weiss issued two reports and testified at deposition prior to the ex parte contact, we decline to strike that evidence from the record. However, in order preserve the appearance of impartiality and the legitimacy of the medical evaluation process, we will strike the July 22, 2023 report of Dr. Weiss from evidence because it issued after the ex parte contact.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of December 12, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of December 12, 2023 is **RESCINDED,** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant's email dated June 25, 2023, to Qualified Medical Evaluator Diane Weiss, M.D., constituted impermissible contact pursuant to Labor Code section 4062.3(g).

ORDERS

a. Defendant's Petition for a replacement panel of Qualified Medical Evaluators is granted.
b. The Division of Workers' Compensation Medical Unit is ordered to issue a replacement panel of Qualified Medical Evaluators in the specialty of psychiatry within a reasonable geographic distance of applicant's home zip code of 92705.

c. The parties are ordered to proceed with the selection of a replacement QME pursuant to Labor Code section 4062.2.

d. The July 22, 2023 report of QME Dr. Weiss is stricken from the record. All other reports and deposition transcripts of Dr. Weiss remain in evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 31, 2025

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

PETER PHAM
MALLERY & STERN
MICHAEL SULLIVAN & ASSOCIATES

SAR/abs

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