WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KAREN SIGURDSON, *Applicant*

vs.

WOODSTOVE & SON CONTRACTOR DIRECT; MARKEL SERVICE, INC., dba MARKEL INSURANCE SERVICES, *Defendants*

Adjudication Number: ADJ14365786
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on July 14, 2022. By the F&O, the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE) to her arms, hands, neck or back. The WCJ further found that defendant's letter to the agreed medical evaluator (AME) did not violate Labor Code[1] section 4062.3 or Administrative Director (AD) Rule 35. (Lab. Code, § 4062.3; Cal. Code Regs., tit. 8, § 35.) The AME's December 19, 2021 report was ordered received into evidence and applicant was ordered to take nothing on her claim.

Applicant contends that defendant's advocacy letter was not served on her 20 days prior to service on the AME in violation of AD Rule 35. Applicant further contends that the AME's December 19, 2021 supplemental report should not be admitted into evidence due to this violation of AD Rule 35. Lastly, applicant contends that the record requires further development on whether she sustained an injury AOE/COE to her neck and back.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the

[1] All further statutory references are to the Labor Code unless otherwise stated.

record and for the reasons discussed below, we will deny the Petition.

FACTUAL BACKGROUND

We adopt and incorporate the material facts from the WCJ's Report:

> Applicant filed a prior claim (ADJ12243136) against the same employer for a specific injury to the hands on 1/21/19 "due to repetitive motion in typing." Dr. Ramon Jimenez was appointed the QME in that case and authored two reports dated 1/16/20 (Ex. J-5) and 2/14/20 (Ex. J-4). In the first report, on page 3, Dr. Jimenez recorded the history that "She gradually developed pain in her bilateral elbows and hands due to the repetitive nature of her job." On page 27, he stated: "Ms. Karen Sigurdson has a claim for cumulative trauma injury as of January 21, 2019." On page 29, he stated: "It is my opinion that the work injury of January 21, 2019 is related to the resultant diagnosis and disability on a cumulative trauma basis by direct causation. Therefore, her injury is AOE/COE." He found Applicant's condition to be at maximum medical improvement as of the evaluation date in January, 2020, and he provided impairment ratings. In the supplemental report of 2/14/20, he changed his opinion on apportionment following review of additional records that concerned a 2006 injury to the cervical spine.
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> The claim in ADJ12243136 was settled by Compromise & Release in the amount of $50,000, approved on 7/28/20. The information on page 4 recites that the settlement concerns an injury on 1/21/19 to the hands, upper extremities, arms, elbows, wrists, fingers, CTS, chronic pain and triceps, CRPS and any/all compensable consequences. On page 7, under "Comments," the following is stated:
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>> *For good consideration this agreement settles all claims by applicant of injury to the body parts pleaded as well as those stated at pages 3-5, whether accepted or denied, whether caused by a specific injury, cumulative trauma, and/or occupational disease, including any/all compensable consequences, for all periods of employment by employer/defendant from the date of hire through and including the last day worked. Applicant is represented by counsel and affirms an understanding of all terms of this agreement (C&R) having had the opportunity to ask and have answered all questions and fully understanding and accepting the terms, meaning, and ramifications of this settlement agreement.*
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> The Application filed on 3/11/21 in the instant case claimed cumulative injury to the "back, hand and arm" from 11/27/20 through 2/26/21. However, the date of injury and body parts claimed were changed in the Pre-trial Conference Statement, to read: "C/T 3/14/2018-3/4/2019….to neck, back, arms, hands." This was carried forward without change into the Minutes of Hearing of 6/15/22.

The change of injury date was made because Applicant ceased working for this employer on 3/4/19. Defendant denied this claim and filed a petition to dismiss it as duplicative of the prior, settled claim.

Dr. Peter Mandell was appointed the AME in the present case. On 6/9/21, defense counsel wrote his initial advocacy letter to Dr. Mandell (Ex. J-9). Four paragraphs on page 2 of this letter were devoted to a discussion of Applicant's prior upper extremity CT claim, and Dr. Mandell was provided with the reports from Dr. Jimenez, the QME in that claim. Defense counsel advised Dr. Mandell that the new upper extremity claim was denied, as was the claim of injury to the neck and back, and Dr. Mandell was supplied with extensive records that were relevant to the neck and back claim. No advocacy letter from Applicant's attorney, challenging the information provided by defense counsel, was sent to Dr. Mandell, as far as the record reflects.

On 7/1/21, Dr. Mandell penned his initial report (Ex. J-1). Under "Current Complaints" on page 2, Applicant told Dr. Mandell about symptoms she was having in her upper extremities. At the end of his reporting of Applicant's complaints, Dr. Mandell stated: "She was asked multiple times. She recalls no other symptoms except as noted above." On page 8, after listing the upper extremity problems, the doctor again stated: "Ms. Sigurdson was asked multiple times. She made no complaints to me about neck pain or back pain." However, he assigned a *Guzman* impairment rating for the upper extremity conditions, of 30%. Causation was cumulative trauma, which Dr. Mandell said would be apportioned 50% to the prior, settled claim, and 50% to the newer claim.

On 12/14/21, Defendant's attorney sent another letter to Dr. Mandell (Ex. J-10), but did not send the letter to Applicant's attorney 20 days before sending it to Dr. Mandell, although the letter was copied to Applicant's attorney. This letter devotes almost four pages to going over the information previously provided to the doctor and to arguing Defendant's position that there is a total overlap between the prior, settled claim and the current claim, with respect to the upper extremities. Dr. Mandell responded in his report dated 12/19/21 (Ex. J-2):

> *I agree that Dr. Jimenez's evaluation would have taken into consideration any effects of Ms. Sigurdson's employment through 3/4/19. I also agree that as nearly as I can tell, there is no medical/factual evidence to support an allegation of a new cumulative trauma injury sustained through 3/4/19. You also correctly note that I documented for the parties that Ms. Sigurson did not complain to me about neck or back problems during my encounter with her. Just to be clear, that doesn't mean she wasn't having such problems. Perhaps she was having a particularly good day when she saw me. Perhaps the strain of a disability evaluation caused her to focus more on some parts of the body rather than others, but given the facts that were in play that day, there was no reason to consider 'new' injuries to the neck or back. I believe what*

you're telling me is that if it isn't written down in black letters, then legally neck or back complaints don't exist for Ms. Sigurdson.

On 3/8/22, Defendant filed a Declaration of Readiness to Proceed, requesting a Mandatory Settlement Conference on its Petition for Dismissal and noting that AME Mandell did not support the CT claim in the present case. Applicant did not object to Defendant's DOR. At the MSC that subsequently took place on 4/4/22, I commented that, "Only issue to be tried is aoe/coe. Discovery closed." Applicant objected to setting the case for trial, but the reason for the objection is not stated in the Minutes.

On April 17, 2022, Applicant filed an "Objection To Petition For Dismissal." The issue concerning Defendant's second advocacy letter and Dr. Mandell's response to it was not mentioned. Instead, Applicant contended that the current claim should not be dismissed, because Dr. Mandell found causation for the CT injury, and the present claim alleged additional body parts, a different mechanism of injury and a different injury date.

In her deposition on 10/17/19 (Ex. J-8), Applicant was asked on page 40, "Currently, so what body parts are you claiming that you injured from your work at Woodstone and Sun?" She answered, "My left and right arms." On page 42, she testified she was placed on modified work in January, limiting her to 30 minutes of typing and 30 minutes not typing [the context suggests this was in 2019].

(Report, August 18, 2022, pp. 1-4.)

The matter proceeded to trial on June 15, 2022 on the following issues:

(a) Injury AOE/COE.

(b) Viability of the application in ADJ 14365786.

(c) Whether Defendant's letter to Dr. Mandell was required to be served on Applicant's attorney 20 days prior to sending the letter to the doctor. (Labor Code Section 4062.3 and Title 8 CCR Section 35).

(d) Whether Dr. Mandell's supplemental report should be received in evidence.

(e) Defendant requests judicial notice of the Board file in ADJ 12243136 to include the C&R documents, the order approving C&R, and the PQME reporting of Dr. Jimenez, as well as the amended application in that case.

(f) Whether Defendant's Petition for Dismissal, dated 3/8/22, should be granted or denied.

(Minutes of Hearing, June 15, 2022, p. 2.)

The WCJ issued the resulting F&O as outlined above.

DISCUSSION

I.

Section 4062.3 provides as follows in relevant part:

> (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) Medical and nonmedical records relevant to determination of the medical issue.
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> (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.
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> **(c) If an agreed medical evaluator is selected, as part of their agreement on an evaluator, the parties shall agree on what information is to be provided to the agreed medical evaluator.**
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> ...
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> (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.
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> (Lab. Code, § 4062.3(a)-(c) and (f), emphasis added.)

AD Rule 35 separately states:

> Represented parties who have selected an Agreed Medical Evaluator or an Agreed Panel QME shall, as part of their agreement, agree on what information is to be provided to the AME or the Agreed Panel QME, respectively.
> (Cal. Code Regs., tit. 8, § 35(b)(2).)

In *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, 143 (Appeals Board en banc), the Appeals Board acknowledged that section 4062.3(c) "requires the parties' agreement before any 'information' is provided to an AME," but alternatively, "when a party wishes to send a 'communication' to an AME, it is necessary only to serve the opposing party with that communication." Due to the differing treatment of information versus communication in the statute, the Appeals Board in *Maxham* delineated between the two as subsequently explained in another en banc decision:

> The preliminary question is whether the documents or materials sent to the QME are "information" or "communication" as those terms are used in the Labor Code.
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> In *Maxham*, the Appeals Board distinguished between "information" and "communication" under section 4062.3 as follows:
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> '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.
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> 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*, 82 Cal.Comp.Cases at p. 138.)
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> (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1810 (Appeals Board en banc).)

Applicant primarily takes issue with portions of defendant's December 14, 2021 letter that are characterized as "biased" against applicant. These parts of the letter concern defendant's legal position regarding the viability of applicant's second claim. In *Maxham*, the Appeals Board concluded that "engaging in legitimate 'advocacy' does not transform correspondence with a medical examiner from 'communication' into 'information.' " (*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 146.) It was further noted in a footnote:

> After all, parties typically select a medical examiner "because of his or her expertise and neutrality." (See *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, 556, citing *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [224 Cal.Rptr. 758, 51 Cal.Comp.Cases 114].) Given a medical examiner's presumed expertise and neutrality, he or she is well-

> equipped to evaluate the parties' reasonable advocacy when formulating an opinion regarding each case.
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> (*Id.* at p. 146, fn. 13.)

Dr. Mandell acted as an AME in this matter. As noted in *Maxham*, it is presumed the parties chose him due to his expertise and neutrality. It is also presumed and the record supports that Dr. Mandell was capable of formulating his opinions in a neutral fashion despite defendant's assertions of its legal position in its advocacy letter.

However, defendant's December 14, 2021 letter to the AME may still fairly be deemed "information" as defined in *Maxham*. The letter discusses both medical and nonmedical records relevant to determination of the medical issues including pleadings, as well as the reporting of the QME Dr. Ramon Jimenez. Consequently, defendant's letter was "information" subject to section 4062.3(c).

In *Maxham*, the Appeals Board further opined in relevant part:

> In the event a piece of correspondence is deemed to be "information" under the above analysis, the next step is to determine whether providing that "information" to the AME was prohibited. Section 4062.3(c) establishes that, when an AME is selected, "the parties shall agree on what information is to be provided to the agreed medical evaluator." (Lab. Code, § 4062.3(c).) Accordingly, if the correspondence contains, references, or encloses (1) records prepared or maintained by the employee's treating physician or physicians, or (2) medical and nonmedical records relevant to determination of the medical issue *that the parties previously agreed to provide to the AME*, serving that correspondence on the AME without giving the opposing party an opportunity to object would not violate section 4062.3(c). Only when the correspondence contains, references, or encloses "information" which the parties have not agreed to provide to the AME does it violate section 4062.3(c).
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> (*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 144, italics in original.)

For the reasons discussed below, we are skeptical that defendant violated section 4062.3(c) by its December 14, 2021 letter to the AME. In evaluating whether applicant's requested remedy of excluding the AME's December 19, 2021 report is warranted, we are guided in part by *Suon*. *Suon* provided factors to consider for a violation of section 4062.3(b), whereas here there is an alleged violation of section 4062.3(c). We believe the same factors may be adapted to determine the appropriate remedy, if any, where the information is sent to an AME rather than a QME. The factors provided in *Suon* include:

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.

5. 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.)

(*Suon*, *supra*, 83 Cal.Comp.Cases at pp. 1815-1816.)

As discussed by the WCJ in his Opinion on Decision, the information contained in defendant's December 14, 2021 letter to the AME did not contain substantially different information from what was previously discussed in defendant's June 29, 2021 letter. The June 29, 2021 letter was 25 pages long and went into extensive detail about applicant's prior claim, the QME Dr. Jimenez's reports and other medical records. Defendant also enclosed multiple medical records including Dr. Jimenez's reports with its June 29, 2021 letter. We discern no prejudicial impact from defendant's discussion of applicant's medical records including the QME's reporting on the prior claim. Dr. Jimenez's reporting was probative and relevant on the question of causation, which was in dispute for this claim. Applicant does not dispute the authenticity of these records.

The record does not contain an objection by applicant to provision of this information to the AME when it was first served on him, which Dr. Mandell's July 1, 2021 report reflects were reviewed as part of his evaluation. There was also no objection by applicant to defendant's subsequent December 14, 2021 letter. Although the record does not contain an express agreement by the parties to provide this information to the AME, we agree with the WCJ that it may be inferred that the parties were in agreement to send the information from the prior case to Dr. Mandell due to the lack of an objection by applicant. The first objection by applicant to what

defendant sent to the AME does not appear to occur until the April 4, 2022 mandatory settlement conference. Per the discussion above, the parties presumably chose Dr. Mandell as the AME due to his expertise and neutrality. The record does not reflect a valid basis to exclude his December 19, 2021 report and we decline to do so.

II.

Applicant bears the burden of proving her injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) Section 5502(d)(3) provides as follows in relevant part:

> Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.
>
> (Lab. Code, § 5502(d)(3).)

Discovery accordingly typically closes at the mandatory settlement conference as it did in this matter at the April 4, 2022 hearing. Applicant contends that the record must be further developed to address whether she sustained injury to her neck and back. The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) However, the duty to develop the record must be balanced with the parties' obligation to exercise due diligence to complete necessary discovery prior to a mandatory settlement conference. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp. Cases 986].)

Defendant filed a declaration of readiness to proceed (DOR) on March 8, 2022. The record does not reflect an objection by applicant to the DOR. The matter proceeded to the April 4, 2022 mandatory settlement conference at which time discovery was closed. Although the minutes from the April 4, 2022 hearing show that applicant opposed defendant's request that the matter be continued to trial, the record does not contain a reason why applicant opposed proceeding to trial or an objection to discovery being closed. The Minutes of Hearing from the June 15, 2022 trial

do not show an objection by applicant to proceeding or a request for development of the record. The first request to develop the record does not appear to have been lodged until applicant's June 30, 2022 trial brief. No reason for failing to pursue discovery has been provided by applicant. Under the circumstances here, there is not a basis to further develop the record.

Therefore, we will deny applicant's Petition.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Orders issued by the WCJ on July 14, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 10, 2022

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

D'ANDRE LAW
KAREN SIGURDSON
SHATFORD LAW

AI/*pc*

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