WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HERLIN CINTO, *Applicant*

vs.

H&H DELISH LLC/TERIYAKI MADNESS; TECHNOLOGY INSURANCE COMPANY, administered by AMTRUST NORTH AMERICA, *Defendants*

Adjudication Number: ADJ16690008
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the Findings and Order (F&O) issued on December 12, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a machine operator on April 25, 2023, applicant sustained injury arising out of and in the course of employment to his left arm, left wrist and five left fingers, and claims to have sustained injury arising out of and in the course of employment to his bilateral shoulders, neck and psyche; and (2) the communication of defendant's attorney to the PQME's office was insignificant and inconsequential.

The WCJ denied applicant's request to replace the PQME pursuant to Labor Code section 4062.3(g).

Applicant contends that the WCJ erroneously failed to (1) find that defendant engaged in an impermissible ex parte communication with the PQME; and (2) determine what, if any, remedy is appropriate under *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (en banc).

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will treat the Petition as one for reconsideration, grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that (1) defendant's attorney did not violate Labor Code section 4062.3(g) because the ex parte communication to the

PQME's office was insignificant and inconsequential; and (2) the alleged Labor Code section 4062.3(b) violation may not be adjudicated under *Suon* because it was resolved and applicant cannot show aggrievement resulting from defendant's attorney's conduct.

FACTUAL BACKGROUND

In the Report, the WCJ states:

[T]he parties stipulated that:

- prior to Defense Attorney sending their letter to the doctor, Applicant Attorney timely objected to two proposed exhibits (job description and denial letter) to the Defense Attorney's proposed letter; (9/13/2023 Minutes of Hearing, EAMS ID# 77172243, Stipulation 11 at 3)
- after the defense attorney sent their letter to the doctor, Applicant's Attorney alerted Defense Attorney that they failed to remove the two objected to exhibits from the letter that they sent to the PQME; (*Id*., Stipulation 12 at 3)
- before the PQME himself received the letter and packet, his office was contacted by Defense Attorney's office via e-mail with a cc on Applicant Attorney's office, and the two objected to exhibits were removed from the documents actually provided to the doctor to review and comment upon; (*Id*., Stipulation 13 at 3) and,
- the PQME in fact did not review or address either the job description or the denial letter. (*Id*., Stipulation 14 at 3)

The issue submitted at trial was whether the Defense Attorney's inclusion of the two objected to exhibits necessarily result in the replacement of the PQME pursuant to Labor Code section 4062.3(g).

This WCJ opined that the communications between the defense counsel's office and the PQME's office was not substantive in nature and instead in fact procedural and therefore the remedy of replacing the PQME is unsupported. Applicant seeks Removal of the undersigned's decision that Applicant is not entitled to a new QME citing that the PQME's "**opportunity** to review objected to nonmedical records … impedes Applicant's right to be evaluated by a doctor who is neutral and unbiased." (Emphasis added) (Applicant's Petition for Removal at 1:27-2:3, EAMS ID# 49761193.)

. . .

As set forth in the Opinion on Decision, this WCJ opined that the communications between the defense counsel's office and the PQME's office was not substantive in nature and instead procedural. Although not stated specifically within the Opinion on Decision, this WCJ concluded that there was ex parte communication between the Defense Counsel and the PQME office. This WCJ did, however, explicitly set forth that not all ex parte communication is impermissible; specifically, communications that occur in the course of a QME evaluation and those that are "so insignificant and inconsequential that any resulting repercussion would be unreasonable" as set forth in *Martinsen* (*Lon*) v. *H&H Enterprises, Inc.* (2023) 2023

Cal. Wrk. Comp. P.D. LEXIS 16 and *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal. App. 4th 575.

The ex parte communication at issue here, between Defense Counsel and the PQME office, was intended to ensure that the 2 specific objected to records that were inadvertently sent to the PQME office for review by Defense Counsel's office, were not in fact reviewed by the PQME and instead removed by the PQME office staff before the document packet was provided to the PQME. That is what was requested. That is what took place. Parties stipulated that the doctor did not review or address either the job description or the denial letter as per Stipulation 14 of the September 12, 2023 Minutes of Hearing. This is an example of a communication that is "so insignificant and inconsequential that any resulting repercussion would be unreasonable." (*Alvarez*, *supra*, 187 Cal. App. 4th at p. 590.)

. . .

Although the communication between Defense Counsel and the PQME office was ex parte, this WCJ has determined that such communication was not substantive in nature and instead procedural. As such there is no need for any further analysis pursuant to *Suon*. The communication does not rise to the level of being a violation of Labor Code 4062.3 and a determination of same, under these specific set of facts, would instead "lead to absurd results. [citations omitted]" (*Alvarez*, *supra*, at p. 590.)

As this WCJ has not determined that a violation of Labor Code section 4062.3 has resulted from the communications between Defense Counsel and the PQME, there is no need for an analysis as to an appropriate remedy.
(Report, pp. 2-5.)

DISCUSSION

Preliminarily, we observe that 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 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 issues.

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.

Here, the WCJ's decision includes a finding regarding a threshold issue, i.e., while employed as a machine operator on April 25, 2023, applicant sustained injury arising out of and in the course of employment to his left arm, left wrist and five left fingers, and claims to have sustained injury arising out of and in the course of employment to his bilateral shoulders, neck and psyche. It follows that the WCJ's decision is a final order subject to reconsideration, and, since the Petition only challenges the interlocutory finding that the communication of defendant's attorney to the PQME's office was insignificant and inconsequential, the removal standard applies to our evaluation of its merits. (See *Gaona*, *supra*.)

We observe that 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 significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955; see also *Cortez*, *supra*; *Kleemann*, *supra*.) In addition, 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.)

The Petition first contends that the WCJ erroneously failed to find that defendant engaged in an impermissible ex parte communication with the PQME. Specifically, applicant contends that defendant requested the PQME's office to remove nonmedical records to which applicant's attorney had objected from materials to be reviewed by the PQME without copying applicant's attorney on the request.

Labor Code section 4062.3 provides, in pertinent 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.

(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).)

Here, as stated in the Report, the WCJ determined that defendant's attorney's request to the PQME's office to remove nonmedical records to which applicant's attorney had objected from materials to be reviewed by the PQME constituted an ex parte communication. But since the ex parte communication involved inconsequential administrative matters, it was deemed impermissible and not warranting a remedy. (Report, pp. 4-5; *Alvarez v. Workel*, 187 Cal.App.4th 575 [75 Cal.Comp.Cases 817].)

Accordingly, we are unable to discern support for applicant's argument that the WCJ erroneously failed to find that defendant engaged in an impermissible ex parte communication with the PQME.

However, although the F&O includes a finding that defendant's attorney's communication with the PQME's office was insignificant and inconsequential, it does not specifically find that defendant's attorney did not violate Labor Code section 4062.3(g) because the ex parte communication to the PQME's office was insignificant and inconsequential.

Accordingly, we will amend the F&O to find that defendant's attorney did not violate Labor Code section 4062.3(g) because the ex parte communication to the PQME's office was insignificant and inconsequential.

We next address applicant's argument that the WCJ erroneously failed to determine what, if any, remedy is appropriate under *Suon*.

In *Suon*, we held that (1) alleged violations of Labor Code section 4062.3(b), which prohibits materials to which a party has objected from being provided to the PQME absent court leave, must be adjudicated by the WCJ unless the parties informally resolve their dispute; (2) a party aggrieved by a violation of Labor Code section 4062.3(b) may elect to terminate the PQME evaluation and seek a new evaluation following discovery of an impermissible ex parte communication; and (3) the WCJ has wide discretion, and may consider a range of factors, to determine what if any remedy is appropriate for a Labor Code section 4062.3(b) violation.

Here, applicant alleges that (1) defendant's attorney violated Labor Code section 4062.3(b) by providing nonmedical records to which he had objected to the PQME's office; (2) he is entitled to terminate the PQME evaluation and seek and new evaluation; and (3) the WCJ may adjudicate what, if any, remedy is appropriate.

But the record shows that, notwithstanding that defendant's attorney improperly provided nonmedical records to which applicant's attorney had objected to the PQME's office, defendant's attorney shortly thereafter secured the removal of the objected-to nonmedical records from the materials to be reviewed by the PQME. (Report, pp. 4-5.)

It follows that the alleged Labor Code section 4062.3(b) violation before us was resolved, that applicant cannot state facts demonstrating his aggrievement by defendant's attorney's conduct, and, therefore, that the alleged violation may not be adjudicated under *Suon*.

Accordingly, we are unable to discern support for applicant's contention that the WCJ erroneously failed to determine what, if any, remedy is appropriate under *Suon*.

However, the F&O omits a finding that the alleged Labor Code section 4062.3(b) violation may not be adjudicated under *Suon* because it was resolved and applicant cannot show aggrievement resulting from defendant's attorney's conduct. Accordingly, we will so amend the F&O.

Accordingly, we will treat the Petition as one for reconsideration, grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that (1) defendant's attorney did not violate Labor Code section 4062.3(g) because the ex parte communication to the PQME's office was insignificant and inconsequential; and (2) the alleged Labor Code section 4062.3(b) violation may not be adjudicated under *Suon* because it was resolved and applicant cannot show aggrievement resulting from defendant's attorney's conduct.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on December 12, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on December 12, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

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2. Defendant's attorney did not violate Labor Code section 4062.3(g) because the ex parte communication to the PQME's office was insignificant and inconsequential.

3. The alleged Labor Code section 4062.3(b) violation may not be adjudicated under *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (en banc) because it was resolved and applicant cannot show aggrievement resulting from defendant's attorney's conduct.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
MARCH 4, 2024
SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

HERLIN CINTO
LAW OFFICES OF REMIN R. YOUNESSI
LLARENA, MURDOCK, LOPEZ & AZIZAD

SRO/*cs*

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