WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MINA LEWINSTEIN, *Applicant*

vs.

ABRA MANAGEMENT; ACE AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ11024968, ADJ11024988
Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION
FOR REMOVAL
AND DECISION
AFTER REMOVAL

Defendant seeks removal of the Joint Findings of Fact and Order (Joint F&O) issued by the workers' compensation administrative law judge (WCJ) on September 20, 2021.[1] By the Joint F&O, the WCJ found that the post-examination telephone calls of the panel qualified medical evaluator (QME) with applicant were an impermissible ex parte communication. The WCJ ordered the Medical Unit to issue a replacement panel in psychiatry.

Defendant contends that applicant gave the QME permission to contact her by telephone. Defendant also contends that the QME was permitted to communicate with applicant in connection with the examination per Labor Code[2] section 4062.3(i) and thus, there was no impermissible ex parte communication with the QME. (Lab. Code, § 4062.3(i).)

We received an answer from applicant. The WCJ issued a Report and Recommendation on Defendant's Petition for Removal (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition, rescind the Joint F&O and issue a new decision finding that there is no basis to strike the QME or for a replacement panel in psychiatry. Applicant's request for a replacement panel will be denied.

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[1] The Joint F&O is dated September 17, 2021, but was not served until September 20, 2021.
[2] All further statutory references are to the Labor Code unless otherwise stated.

FACTUAL BACKGROUND

Applicant claims two injuries while employed as a property manager by Abra Management: 1) to the right leg, right ankle, right foot, right toes, psyche, low back, sleep disorder, internal system, stomach, irritable bowel syndrome and GERD through August 23, 2017 (ADJ11024968); and 2) to the right leg, right ankle, right foot, right toes, psyche, low back, sleep disorder, internal system, stomach, irritable bowel syndrome and GERD on October 23, 2016 (ADJ11024988). Defendant has denied both claims.

A QME panel in psychiatry was obtained and Donald Stanford, M.D. was the selected physician from this panel. Dr. Stanford evaluated applicant in April 2020. (Applicant's Exhibit No. 1, Report of PQME Donald Stanford, M.D., May 11, 2020, p. 1.) In his report, Dr. Stanford relayed the following as relevant herein:

> I questioned Ms. Lewinstein about some aspects of her medical records. (Subsequently I called Ms. Lewinstein and asked her further questions about her medical records which I will relate below.)
> …
> Following my examination of Ms. Lewinstein I spoke to her on the telephone, with her permission, concerning a reference in the QME evaluation provided by Dr. Polfliet to Ms. Lewinstein having to clean up after a tenant killed himself in one of the units that she managed. Ms. Lewinstein stated that there were four or five such situations.
>
> (*Id.* at pp. 6 and 8.)

Applicant requested a replacement QME panel on the basis that Dr. Stanford had engaged in ex parte communication. (Defendant's Exhibit A, Denial letter from the Medical Unit, June 24, 2020.) The Medical Unit denied this request stating that "[t]his matter would fall under the jurisdiction of the Workers' Compensation Appeals Board (WCAB)." (*Id.*)

The matter proceeded to trial on July 28, 2021 on the issues of whether to strike Dr. Stanford for impermissible conduct and a replacement panel in psychiatry. (Minutes of Hearing and Summary of Evidence, Order of Consolidation, July 28, 2021, p. 2.) Applicant testified at trial as follows in relevant part:

> The only further contact she had with the doctor was when he called. She estimated four calls, not including messages. He left three to four messages, in addition to the phone calls. Two of the calls were in the evening, two late afternoon. The doctor never said what he wanted in the messages, just asking if

she could call back. The calls were a few days after the initial medical exam. She does not remember what he was calling about, but remembers speaking about her brother in one of the conversations. She recalls speaking to the doctor maybe five minutes each time, more or less.

She was bothered by these conversations with the doctor. She figured whatever the doctor wanted, he could have discussed with her at the time of the examination. She considered it harassing, being called so many times. Ms. Lewinstein felt uncomfortable and nervous. She didn't know what he was calling about. Ms. Lewinstein felt the phone calls were inappropriate.

…

Ms. Lewinstein remembered calling the doctor's office to confirm the examination. She was late for the exam.

…

Ms. Lewinstein believes the late afternoon calls from Dr. Stanford were around 4:00 p.m., coming in a couple of days after the examination.

…

She recalled the doctor focusing on her family history. He spoke very little about her employment at Abra Management.

…

The doctor may have suggested, if he had a question, that he call, but Ms. Lewinstein does not remember that.

…

The questions asked by Dr. Stanford, to the best of her understanding, were related to Ms. Lewinstein's Workers' Compensation case versus a personal conversation.

(*Id.* at pp. 3-5.)

Dr. Stanford also testified at trial as follows:

The doctor testified the law requires him to document all medical history and all prior procedures.

…

Dr. Stanford testified Ms. Lewinstein was 30 minutes late for her exam. He did not terminate her appointment abruptly.

Dr. Stanford testified he reviewed her medical records prior to the examination, but testified a person's medical records do not have as much meaning prior to the examination as they do after he meets the person. He found four issues "potentially disturbing" that he documented on page 8 of his report, after he contacted Ms. Lewinstein by phone. These include the suicide of a tenant and the death of an individual's mother. He wanted to ask Ms. Lewinstein how these affected her, and they had not come up in the records he had reviewed, or in their meeting.

> The doctor remembered calling her once, and Ms. Lewinstein calling him once. He was not sure when he called her.
>
> In his past QME evaluations, he has followed up with other patients. He always asks for their numbers and they always provide it.
> …
> Before the doctor called Ms. Lewinstein, he did not get permission of the attorneys.
>
> When Dr. Stanford called Ms. Lewinstein, he spent 20 minutes, maybe longer on the phone with her. It did not occur to him to document the length of the conversation. He testified he called her once, then said possibly twice. When asked, the doctor indicated that the phone calls could have been longer than 20 minutes, potentially 30 to 40 minutes, though he cannot confirm. Conversely, the conversations may have been five to ten minutes. Again, the doctor testified he did not feel it was necessary to document the length or the content of the conversations in his report.
> …
> The doctor estimated leaving one message for Ms. Lewinstein, saying maybe he called her more times than that, but he doubted it.
>
> The doctor denied calling her at night, and doubted he would have called her after 5:00 p.m. However, he did not confirm any time of day for the phone calls.
> …
> During the examination, he would have told Ms. Lewinstein he would be contacting her, which is how he would have secured her phone number.
>
> (*Id.* at pp. 6-8.)

The WCJ issued the Joint F&O as outlined above. In the Report, the WCJ addressed defendant's contention that Dr. Stanford's phone calls were permissible per section 4062.3(i):

> The Court disagrees, believing this is truly limited to "the examination," such as confirmation of time and location, parking details, etc. with the injured worker. It does not give unfettered access by a doctor's office to an injured worker, particularly after a scheduled examination has already occurred.
>
> (Report, November 1, 2021, p. 5.)

DISCUSSION

Removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award.

(Cal. Code Regs., tit. 8, § 10955(a); *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 issue of whether there should be a new QME panel must be addressed before further discovery and proceedings are conducted. Both parties will be significantly prejudiced by continued trial preparation without addressing whether medical-legal discovery may continue with the current QME.

Section 4062.3 provides in relevant part as follows:

> (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.
> …
> (i) Subdivisions (e) and (g) shall not apply to oral or written communications by the employee or, if the employee is deceased, the employee's dependent, in the course of the examination or at the request of the evaluator in connection with the examination.
>
> (Lab. Code, § 4062.3(e), (g) & (i).)

Administrative director (AD) Rule 35(k) further states in pertinent part:

> The Appeals Board shall retain jurisdiction in all cases to determine disputes arising from objections and whether ex parte contact in violation of Labor Code section 4062.3 or this section of Title 8 of the California Code of Regulations has occurred. If any party communicates with an evaluator in violation of Labor Code section 4062.3, the Medical Director shall provide the aggrieved party with a new panel in which to select a new QME or the aggrieved party may elect to proceed with the original evaluator. Oral or written communications by the employee, or if the employee is deceased by the employee's dependent, made in the course of the examination or made at the request of the evaluator in connection with the examination shall not provide grounds for a new evaluator

> unless the Appeals Board has made a specific finding of an impermissible ex parte communication.
> (Cal. Code Regs., tit. 8, § 35(k).)

Ex parte communication with a QME is prohibited. (See *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 590 [75 Cal.Comp.Cases 817]; see also *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1809 (Appeals Board en banc).) However, the Court of Appeal has acknowledged an exception to this general prohibition provided in the Labor Code:

> The only statutory exception to the proscription against ex parte communications is set forth in section 4062.3, subdivision (h), which concerns communication by the employee or the deceased employee's dependent in the course of or in connection with the examination.
>
> (*Alvarez*, *supra*, 187 Cal.App.4th at p. 587.)[3]

While ex parte communication with the QME is generally prohibited, oral and written communications by an employee with the QME "in the course of the examination or at the request of the evaluator in connection with the examination" are permissible.

The Labor Code thus provides for a medical-legal evaluator to communicate with an employee in the course of or in connection with an examination in order to render medical-legal conclusions based on an adequate and complete history. (See *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93] ["Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories."].) Additionally, medical-legal evaluators are entrusted to utilize their judgment, experience, training and skill in evaluating an employee. (See e.g., *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Almaraz-Guzman III*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837]; see also *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (*Almaraz-Guzman II*) (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc).) A medical-legal evaluator is not entitled to "unfettered access" to an employee, but rather, may be entrusted

[3] At the time of *Alvarez*, current section 4062.3(i) was in subdivision (h) of the statute. The language of the subdivision is identical with the only change being the reference to the other subdivisions.

to communicate with an employee as part of the examination to ask questions that are necessary and appropriate to address the disputed medical-legal issues.

Dr. Stanford's report reflects that he contacted applicant by phone after her examination in order to ask follow-up questions due to issues revealed in her medical records. As stated in his trial testimony, Dr. Stanford wanted to ask applicant how these "potentially disturbing" issues affected her and explained that medical records may not have as much meaning prior to an examination as they do after meeting the person. He testified that he would have told applicant he would be contacting her, which is how he obtained her number and that he would not have called her at night. The record reflects that Dr. Stanford's calls with applicant were in connection with his examination of psychiatric stressors, both industrial and non-industrial, in order to complete his examination. Although applicant may not have appreciated the relevance of Dr. Stanford's questions to her claim, the record does not reflect that these questions exceeded the scope of a medical-legal examination for a psychiatric injury claim. (See e.g., *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 660 [64 Cal.Comp.Cases 624] [placing a medical, emotional or mental condition at issue in a case renders information regarding such conditions to be discoverable]; see also Lab. Code, § 3208.3; *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 245 [determination of causation of a psychiatric injury requires competent medical evidence]; Cal. Code Regs., tit. 8, § 10682(b)(13).) We are unpersuaded that the mere fact that these phone calls were after the examination renders them no longer in connection with Dr. Stanford's examination.

Dr. Stanford's contact with applicant subsequent to the in-person examination was conducted in an acceptable manner to address questions relevant to his role as the psychiatric QME, and was done with applicant's permission and participation. While there may be circumstances where a subsequent communication by a QME with an employee would not be in connection with the examination and would therefore not be permissible under section 4062.3(i), those circumstances are not present here. Therefore, the record does not support a basis to strike Dr. Stanford as the psychiatric QME or an order for a replacement panel.

In conclusion, we will grant removal, rescind the Joint F&O and issue a new decision finding that there is no basis to strike the QME or for a replacement panel in psychiatry. Applicant's request for a replacement panel will be ordered denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the Joint Findings of Fact and Order issued by the WCJ on September 20, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Joint Findings of Fact and Order issued by the WCJ on September 20, 2021 is **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. There is no basis to strike the QME Dr. Donald Stanford for impermissible conduct.

2. There is no basis for a replacement QME panel in psychiatry.

ORDER

IT IS ORDERED that applicant's request for a replacement QME panel in the specialty of psychiatry (MPD) is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 25, 2022

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

INGBER & WEINBERG
LAW OFFICES OF DENNIS HERSHEWE
MINA LEWINSTEIN

AI/*pc*

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