WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CIPRIANO VALLEJO, *Applicant*

vs.

DEPARTMENT OF DEVELOPMENTAL SERVICES, LEGALLY UNINSURED; ADJUSTED BY STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ10691265; ADJ10691133; ADJ10691132
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Removal. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks removal of the June 1, 2022 Joint Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed by the Department of Developmental Services Canyon Springs, sustained industrial injury to "various body parts" on September 14, 2014 (ADJ10691265), April 14, 2015 (ADJ10691133), and August 26, 2016 (ADJ10691132). The WCJ found that applicant established good cause for the deposition of the claims adjuster as well as the person most knowledgeable on the topic of the nature, extent, and frequency of training of State Compensation Insurance Fund (SCIF) adjusters relative to communications as set forth in Labor Code[1] Section 4062.3 as interpreted by *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136 [2017 Cal. Wrk. Comp. LEXIS 6] (Appeals Board en banc) (*Maxham*). The WCJ ordered that the "[t]he Order of 1/26/2021 for the defendant to produce [claims adjuster] Zabrina Hampton for deposition and to produce the person most knowledgeable for the defendant for deposition on the topic of the nature, extent and frequency of training of defendant's adjusters relative to Labor Code Section 4062.3 as interpreted by *Maxham*, is deemed final." (F&O, p. 2.)

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

Defendant contends that it has been denied due process because the claims examiner and person most knowledgeable are third parties; that the F&O orders third-party witnesses to submit to depositions before a proper record concerning the merits of the depositions has been created; that the WCJ's order issued without the necessary procedural due process safeguards; and that the order is inconsistent with applicable civil procedure statutes.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

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

FACTS

Applicant has three pending claims relevant to these proceedings. In ADJ10691265, applicant sustained injury to "various body parts" on September 14, 2014 while employed by the Department of Developmental Services, legally uninsured and administered by State Compensation Insurance Fund. Applicant also sustained injury to "various body parts" while similarly employed by defendant on April 14, 2015 (ADJ10691133) and on August 26, 2016 (ADJ10691265).

The parties have selected Neil J. Halbridge, M.D., as the Agreed Medical Evaluator (AME) in orthopedic medicine. Dr. Halbridge has evaluated applicant and issued multiple reports.

On November 3, 2020, defendant's claims representative Zabrina Hampton issued a letter to Dr. Halbridge requesting clarification of applicant's dates of injury, including the AME's apportionment to an April 14, 2014 injury. (Ex. 7, Defense Letter to AME Dr. Halbridge, November 3, 2020, p. 1.) The letter attached a copy of applicant's Application for Adjudication with respect to a *September* 14, 2014 date of injury, and requested supplemental reporting to clarify the issue of the proper injury date. The letter was copied to applicant's counsel. (*Ibid*.)

On November 18, 2020, defense counsel issued a letter to Dr. Halbridge also requesting clarification as to the various dates of injury, including the dates of a claimed cumulative injury. (Ex. 2, Defense Letter to AME Dr. Halbridge, November 18, 2020, p. 1.) The letter appends diagnostic testing results from a December 19, 2019 MRI study, and requests the issuance of supplemental reporting. The letter was copied to applicant's counsel. (*Ibid*.)

On November 19, 2020, applicant filed a petition seeking an order "requiring SCIF to produce Zabrina Hampton for deposition as well as the person most knowledgeable for SCIF for deposition on the topic of the nature, extent and frequency of training of SCIF adjuster relative to LC 4062.3 and Maxham." (Petition for Discovery Orders, November 19, 2020, at p. 2:14.)

On January 26, 2021, the WCJ appended[2] the following statement to the end of applicant's petition:

> IT IS SO ORDERED. A timely objection filed within 15 days showing good cause will void this Order and may cause this matter to be set for hearing on this issue.

On February 10, 2021, defendant served its objection to the WCJ's order, averring that "written communication with the QME that is properly served to the opposing party is not Ex Parte communication." (Defense Objection, February 10, 2021, at p. 3:18.) Defendant further asserted that section 4062.3 does not provide a specific remedy for violations of the section that are not otherwise ex parte communications, and that the Appeals Board has discretion in fashioning an appropriate remedy. (*Id.* at p. 4:1.) Defendant concluded that any violation was non-prejudicial, and that the depositions of the claims adjuster and a person most knowledgeable were unnecessary and unduly burdensome. (*Ibid*.)

On April 28, 2022, the parties proceeded to trial, framing the sole issue of "Discovery Order of 1/26/2021 to which defendant SCIF has objected." (Minutes of Hearing, April 28, 2022, at p. 2:20.) The parties submitted the matter for decision without testimony.

On June 1, 2022, the WCJ issued the F&O, determining in relevant part that applicant established good cause for the depositions of the claims adjuster and the person most knowledgeable. The WCJ ordered that "[t]he Order of 1/26/2021 … is deemed final."[3] (F&O, Order No. "b".)

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[2] The order contains a clause rendering the order null and void if an objection is received. The proof of service attached to the January 26, 2021 Order designates defendant State Compensation Insurance Fund to serve all parties listed on the official address record with the WCJ's order. However, Appeals Board Rule 10832(e) specifies that "[a]n order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board." (Cal. Code Regs., tit. 8, § 10832(e).) In the future, we recommend that the WCJ consider the issuance of a Notice of Intention, as contemplated by Appeals Board Rule 10832.

[3] The January 26, 2021 order specifies that a timely objection voids the order. The parties do not dispute that defendant timely objected, thus voiding the order, and precluding the order from becoming "final."

Defendant's Petition for Removal contends that defendant will suffer irreparable harm and significant prejudice because the F&O compelled non-party witnesses to submit to deposition prior to the creation of a proper record regarding the merits of the depositions. Defendant further contends that the order issued without the appropriate due process safeguards afforded to the party seeking to resist the deposition and that the depositions are inconsistent with applicable civil procedure statutes.

Applicant's Answer contends that defendant has been afforded appropriate due process, that the WCJ possessed the appropriate jurisdiction and authority to issue rulings on discovery disputes, and that SCIF, as the claims administrator, is a party to the action.

DISCUSSION

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, but are not limited to, the following: 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. (See Lab. Code, § 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. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is final, the petitioner is only challenging interlocutory findings/orders in the decision regarding the discovery dispute. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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(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).)

We begin our discussion by noting that it is the stated public policy of the California workers' compensation system that, "liberal pre-trial discovery is desirable and beneficial for the purpose of … making available in a simple, convenient and inexpensive way facts which otherwise could not be proved except with great difficulty[,] educating the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlement expediting litigation safeguarding against surprise preventing delay, [and] simplifying and narrowing the issues and expediting and facilitating both pre-trial preparation and trial."[4] (*Hardesty v. Mccord & Holdren* (1976) 41 Cal.Comp.Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406] (Appeals Bd. panel decision) (*Hardesty*).)

Section 5710, subd. (a) provides:

> (a) The appeals board, a workers' compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. To that end the attendance of witnesses and the production of records may be required. Depositions may be taken outside the state before any officer authorized to administer oaths. The appeals board or a workers' compensation judge in any proceeding before the appeals board may cause evidence to be taken in other jurisdictions before the agency authorized to hear workers' compensation matters in those other jurisdictions.

[4] 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 *Hardesty* because it addresses and restates the broad approach to discovery utilized in the California workers' compensation system.

(Lab. Code, § 5710(a).)

Section 5710 thus authorizes depositions in workers' compensation proceedings, including "the attendance of witnesses and the production of records." (Lab. Code, § 5710(a).)

Defendant contends that in declining to issue either a deposition notice or a subpoena to the deponents, applicant failed to follow the mandatory procedures required for the undertaking of a deposition pursuant to section 5710. Defendant avers:

> Defendant does not dispute that a party's right to discovery is important but it cannot take precedent (sic) over a party's due process rights or ensuring an accurate procedural record. But by ordering the depositions of Ms. Hampton and the Person Most Knowledgeable, the WCJ permits applicant to ignore the plain language of the California Code of Civil Procedure and, in doing so, deprives Defendant of its due process rights. Applicant did [not] make any attempt to properly serve a subpoena and/or deposition notice on either witness; instead, applicant moved immediately to seeking an order compelling a deposition and, in doing so, applicant prevented Defendant from creating a record concerning the merits of the depositions.

(Petition for Removal, at p. 6:4.)

We agree. The current proceedings were initiated by applicant's November 19, 2020 petition seeking to compel the attendance of two witnesses at deposition. However, the record reflects neither deposition notice nor subpoena issued prior to the applicant's petition, thus depriving defendant of the attendant due process considerations of notice and the opportunity to object to the underlying depositions in the first instance. (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is simply notice and the opportunity to be heard"].)

Moreover, to the extent that section 5710 allows for depositions to be undertaken in workers' compensation proceedings, it also provides that the depositions must be undertaken "in the manner prescribed by law." (Lab. Code, § 5710(a).) This includes the issuance of the appropriate notice of deposition or subpoena prior to seeking the expenditure of the Appeals Board's time and resources via petition to compel the attendance of witnesses. (Lab. Code, § 5710; Code Civ. Proc. §§ 2025.010, 2025.220.) Accordingly, the F&O was obtained without the mandatory procedural steps necessary to ensure due process is afforded to all parties, and we rescind the order compelling the attendance of the witnesses at deposition, accordingly.

However, while we return this matter to the trial level for failure to observe mandatory procedural due process requirements, we also observe that section 5710 incorporates the provisions of Code of Civil Procedure section 2016.010, et seq. Section 2017.010 of the Code of Civil Procedure provides, in relevant part, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (See also *Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 289, 169 Cal.Rptr. 301.)

We also note defendant's contention that the claims adjuster is not a party to this action. However, the Appeals Board has historically treated claims adjusters as parties to the case, and has, where substantively and procedurally appropriate, compelled their deposition. (See, e.g., *Yepez v. Denny's Restaurant* (July 7, 2009, ADJ2542719) [2009 Cal. Wrk. Comp. P.D. LEXIS 333].) Here, the claims adjuster is an employee of the designated claims administrator on behalf of the State of California, legally uninsured. Accordingly, the claims adjuster is not a third party, and applicant may effectuate service of notice of a scheduled deposition either by deposition notice or by subpoena. (Code Civ. Proc., § 2025.280.)

We further observe that the underlying issue of whether there has been a violation of section 4062.3, which governs the exchange of information between the parties and medical-legal evaluators, remains undecided in this matter. In *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136 (Appeals Board en banc), the Appeals Board distinguished between "information" and "communication" under section 4062.3 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.
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> (*Maxham*, at p. 138.)

The *Maxham* decision also analyzed what constitutes an ex parte communication. Specifically, we noted that:

> Black's Law Dictionary defines 'ex parte' as, 'On or from one party only, usually without notice to or argument from the adverse party.' (Black's Law Dict. (7th ed. 1999) p. 597, col. 2.) Black's further states that an 'ex parte communication' is, 'A generally prohibited communication between counsel and the court when opposing counsel is not present.'

(*Id.* at p. 142.)

Here, the WCJ states that "the underlying issue which has yet to be litigated is an impermissible ex parte communication[5] from the defendant to the AME Dr. Halbridge, and the resulting right by applicant to seek discovery on that issue." (Opinion on Decision, at p. 5.)

However, to the extent that the depositions of the adjuster and the person most knowledgeable are relevant to the "nature, extent and frequency of training of SCIF adjuster[s] relative to LC 4062.3 and Maxham," any evaluation of a request for compelled discovery in this regard should be preceded by a determination as to whether such a violation has occurred. (Petition for Discovery Orders, November 19, 2020, at p. 2:15.) This is because a determination on the issue would be directly relevant to the consideration of a motion for compelled discovery arising out alleged violations of section 4062.3.

In summary, section 5710 provides for depositions of witnesses in workers' compensation proceedings in the manner prescribed by law, and generally requires the issuance of a deposition notice or subpoena (as is appropriate, depending on the deponent) as a condition precedent to seeking to compel such discovery. Accordingly, and to the extent that orders herein were obtained without substantive compliance with the notice requirements of section 5710 and the Code of Civil Procedure, we will rescind the F&O and return the matter to the trial level for further proceedings. We further note that any evaluation of a request for compelled discovery relevant to alleged violations of section 4062.3 should necessarily include a formal determination as to whether any such violation has occurred herein, and the corresponding relief afforded to the party alleging the violation.

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[5] In *Suon v. California Dairies* (2018) 83 Cal. Comp. Cases 1803 [2018 Cal. Wrk. Comp. LEXIS 100] (Appeals Bd. en banc) we observed that "[i]f a party engages in ex parte communication with the QME in violation of section 4062.3(e), section 4062.3(g) expressly provides that 'the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator.'" We further noted that in the event of a violation of section 4062.3(b) that is not otherwise ex parte in nature, "the trier of fact … 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…." (*Suon, supra*, at p. 1815.) Here, there has not yet been a formal determination as to the existence, if any, of inappropriate communication or ex parte contact in violation of section 4062.3.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, June 1, 2022 Joint Findings and Orders is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 4, 2024

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

CIPRIANO VALLEJO
ENGLISH LLOYD
STATE COMPENSATION INSURANCE FUND

SAR/abs

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