WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALICE SWETZER, ***Applicant***

vs.

OFFICEMAX INC.; OLD REPUBLIC INSURANCE; administered by GALLAGHER BASSETT, ***Defendants***

Adjudication Numbers: ADJ3409548 (RDG 0112116) ADJ2825274 (RDG 0112117)
Redding District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant Alice Swetzer, appearing *in propria persona*, filed a Petition for Reconsideration from the Joint Order Denying Applicant's Petition to Strike, served December 7, 2020, wherein the workers' compensation administrative law judge (WCJ) denied applicant's request to strike the medical reporting of Qualified Medical Evaluator (QME) Dr. D'Amico and replace him with a different QME. In her Opinion on Decision, the WCJ explained that pursuant to her discretion to fashion an appropriate remedy for a violation of the QME communication rules in Labor Code section 4062.3(b), and under the circumstances presented, she found applicant would not be served by replacement of the QME.

Applicant contends the WCJ's order was procured by fraud, that the evidence does not justify the findings of fact, and that applicant has discovered new material evidence that could not have been discovered with reasonable diligence prior to the hearing. More specifically, applicant contends that defendant engaged in ex parte communication with the QME prior to her examination, by sending a proposed advocacy letter to the QME over applicant's timely objection, as well as contentions that defendant provided undisclosed medical records to the QME. (Petition, 7:19-33.) Applicant further argues that defendant failed to provide applicant with the medical

records that had been served on the QME. With regard to the allegation of newly discovered evidence, applicant refers to a fax sent by Dr. Shalom regarding correction of a 2007 report, that she recently "came across." Applicant seeks to strike Dr. D'Amico's medical reports from the record.

Defendant has filed an Answer to the Petition for Reconsideration, in which defense counsel denies engaging in any ex parte communication with the QME, and asserting compliance with the WCJ's order to file the medical records that had been submitted to the QME in EAMS. Defendant also asserts, in response to applicant's contention that defendant did not serve her with the medical records sent to the QME, that defendant has sent the entire medical file to applicant on at least five occasions in the past two years, in addition to providing the list of medical records sent to the QME.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied, reiterating that she exercised her discretion to frame a remedy most likely to accomplish substantial justice, avoiding additional significant delays without apparent benefit to applicant.

While applicant's petition does not provide clear evidence to establish her allegation of an ex parte communication between defendant and the QME, or her allegation of newly discovered material evidence, in the absence of a record of the proceedings below on applicant's petition for a new QME, we are unable to address the issues raised in applicant's Petition for Reconsideration.

As held in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc) and discussed in *Hernandez v. AMS Staff Leasing* (2011) 76 Cal. Comp. Cases 343, "The WCJ's decision must be based on admitted evidence in the record." (*Hamilton*, 66 Cal.Comp.Cases at 476.

> "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (66 Cal. Comp. Cases at p. 477.)

The record before us is not sufficient for us to determine the parties' framing of the issues and whether the WCJ's determination is properly based on evidence admitted into the record. While this will necessarily further delay the resolution of the issues raised in applicant's petition, we cannot proceed to review the WCJ's order in the absence of a record of the proceedings below.

We cannot determine on this record whether there was in fact an ex parte communication between defendant and the QME, as alleged. If an ex parte communication is ultimately determined to have occurred, Labor Code section 4062.3(g) provides the remedy.[1] (*Suon v. California Dairies* (2018) 83 Cal. Comp. Cases 1803 (Appeals Board en banc).) An aggrieved party may elect not to proceed with the medical evaluation and seek a new evaluation from another qualified medical evaluator, or proceed with the initial evaluation. If a new evaluation is sought, it must be done within a reasonable time following discovery of the prohibited communication. (*Suon*, 83 Cal.Comp.Cases at 1804.) Labor Code section 4062.3(g) provides,

> (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.

The Board in *Suon* held that if the trier of fact determines there was an ex parte communication, an additional determination would be required as to "whether the aggrieved party elected to terminate the evaluation and proceed with a new evaluation within a reasonable time following discovery of the communication." (83 Cal.Comp.Cases at 1817.) Further, there should be inquiry into whether the aggrieved party engaged in conduct inconsistent with an election to terminate the evaluation following discovery of the communication. (See *Dollemore v. Wayne Perry*, 2018 Cal. Wrk. Comp. P.D. LEXIS 528.)

Accordingly, we will return this matter to the trial court for further proceedings, including a determination as to whether there was an ex parte communication, and, if so, whether applicant sought a remedy within a reasonable time after her discovery, based upon a full record of the proceedings as provided in *Hamilton*, *supra.*

[1] Per *Suon*, the remedy for violation of the prohibition on ex parte communications in Labor Code section 4062.3(g) is different from the discretion a WCJ has to fashion a remedy for a violation of Labor Code section 4062.3(b).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Order Denying Applicant's Petition to Strike, served December 7, 2020 is **RESCINDED**.

IT IS FURTHER ORDERED that the matter be **RETURNED** to the trial level for further proceedings as provided herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 6, 2021

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

ALICE SWETZER
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

SV/*pc*

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