WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DAVID MILLER, ***Applicant***

vs.

MOHLER BROS; STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ5822455
Stockton District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Applicant seeks removal of the Findings of Fact, Orders and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 28, 2021. By the F&O, the WCJ removed the psychiatric agreed medical evaluator (AME), Dr. Allan Kipperman, and the orthopedic qualified medical evaluator (QME), Dr. Charles Xeller, from the matter. The WCJ appointed a psychiatrist and orthopedist to evaluate applicant's claim per Labor Code section 5701. (Lab. Code, § 5701.)[1]

Applicant contends that it was error to remove Dr. Kipperman as the psychiatric AME.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Removal (Report) recommending that applicant's Petition be dismissed for failure to serve defendant with his Petition.

We have considered the allegations of applicant's Petition for Removal, defendant'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 as one seeking reconsideration, rescind the F&O and issue a new decision finding that Dr. Kipperman is removed as the psychiatric AME due to applicant's ex parte communication with him. We will also find that there is no basis to replace Dr. Xeller as the orthopedic QME. Only the report tainted by applicant's attorney's ex parte communication will be found inadmissible. We will order the

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

parties to proceed with Dr. Ann Allen for the psychiatric aspect of the claim per section 5701 and continue with Dr. Xeller for the orthopedic parts.

FACTUAL BACKGROUND

Applicant claims injury to the bilateral knees, psyche, low back, hips, left leg, elbows, shoulders and head on February 16, 2006 while employed as a heavy equipment operator by Mohler Bros.

The parties agreed to utilize Dr. Kipperman as a psychiatric AME. Dr. Arthur Auerbach was the original orthopedic QME, but was replaced by Dr. Xeller.

The matter proceeded to a mandatory settlement conference on February 27, 2019. The handwritten comments in the minutes of hearing state as follows:

> [P]arties agree to exchange advocacy letters to PQME Auerbach & AME Kipperman. Defendant will send records to AA and both doctors prior to evaluations.
>
> (Minutes of Hearing, February 27, 2019.)

On November 5, 2019, defendant filed a Petition to be Relieved of AME Agreement requesting that it be relieved from the parties' agreement to use Dr. Kipperman as the psychiatric AME. In its Petition, defendant contends that Dr. Kipperman has failed or refused to review the majority of medical records, and had also mishandled applicant's records.

Dr. Kipperman issued a supplemental report dated November 16, 2019, wherein he states as follows in relevant part:

> Michael Linn, Esq., Applicant Attorney, contacted my Administrative Assistant, Ms. Mara Kimmel, on November 8, 2019, requesting a fax number so that he could provide her with a copy of the Petition to be Relieved of AME Agreement filed by Catherine A. Martinez, Esq., Defense Attorney. Additionally, he also provided Ms. Kimmel with the September 5, 2018 letter from State Compensation Insurance Fund, which lists the reports/documents that pertain to the matter at hand.
>
> Ms. Kimmel alerted me to the nature of the faxed material and began researching the reports and documents that have been reviewed in this case. I very much appreciate having the opportunity to research the situation and to respond to Ms. Martinez's allegations.

(Joint Exhibit XXXX, Report from Dr. Allan Kipperman, November 16, 2019, pp. 1-2.)

On January 6, 2020, defendant filed a pleading titled Additional Grounds for Petition to be Relieved of AME Agreement. In this Petition, defendant contends that applicant engaged in improper ex parte communication with Dr. Kipperman by sending defendant's first Petition to him without copying defendant.

The matter proceeded to trial on June 30, 2020 on the following issues:

> 1. Defendants State Compensation Insurance Fund's Petition to Relieve SCIF from the AME agreement with Dr. Kipperman.
>
> 2. Replace QME Dr. Zeller in both instances. Judge to exercise Labor Code Section 5701, if either of the doctors are replaced.
>
> **LET THE MINUTES REFLECT** that the Court will take judicial notice of State Compensation's Petition to be Relieved from the AME Agreement; and a second one entitled: Additional Grounds for the Petition to be Relieved of AME Agreement with ex-parte content.
>
> (Minutes of Hearing and Summary of Evidence, June 30, 2020, p. 2.)

Applicant's attorney testified as follows in relevant part:

> Dr. Kipperman's report of November 16, 2019, applicant's attorney to provide Kipperman and SCIF with the Petition; this is a true statement that SCIF was not cc'd with that communication. He thought he had SCIF's okay per a 227 Stipulation. He's aware of the rules about communicating with AME's generally and also about ex-parte communications. He was generally aware of rules regarding sending documents to the AME. Applicant's attorney's response is brought to the attention of the Court. He did not notify SCIF of sending the communication. He sent it to the assistant of Dr. Kipperman to avoid talking to Dr. Kipperman, and she was Dr. Kipperman's assistant.
> …
> Attorney Linn relies on the 2/27/2019 Minutes of Hearing agreement.
>
> (*Id.* at pp. 4-5.)

Defendant's attorney also testified in relevant part:

> She did not okay or was she asked to send the Petition to Dr. Kipperman.
>
> (*Id.* at p. 5.)

On December 28, 2020, the WCJ issued an order amending the list of exhibits and submitting the case to determine the issues identified during the June 30, 2020 trial.

The WCJ issued the F&O as outlined above. He removed Dr. Kipperman and Dr. Xeller as the medical-legal evaluators and excluded all of both doctors' reports from evidence. He also appointed Dr. Allen as the regular doctor for the psychiatric claim and Dr. Steven Isono as the regular doctor for the orthopedic parts per section 5701.

DISCUSSION

I.

Applicant sought removal of the F&O. 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 (AOE/COE), 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 injury AOE/COE to the right knee.[2] Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

[2] The parties stipulated to injury AOE/COE to the right knee at trial. (Minutes of Hearing and Summary of Evidence, June 30, 2020, p. 2.) Therefore, we will retain this finding of fact in the new decision. (Lab. Code, § 5702.)

II.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Applicant's Petition was timely filed on February 15, 2021. Our failure to act was due to a procedural error and our time to act on applicant's Petition was tolled.

III.

The WCJ recommended that applicant's Petition be dismissed for failure to serve it on defendant. Defendant confirms in its answer that applicant's Petition was not served on it until February 25, 2021. It is acknowledged that the petitioning party is required to serve a copy of a petition for removal upon all parties. (Cal. Code Regs., tit. 8, § 10955(c).) However, defendant was ultimately served a copy of applicant's Petition and has filed an answer, which we accept. Accordingly, although we take seriously a petitioner's failure to serve all parties as required, we decline to dismiss applicant's Petition for his failure to timely serve defendant.

The WCJ in his Report also discusses pleadings filed by applicant subsequent to his Petition and refers to these documents as supplemental pleadings per WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964.) These do not appear to be supplemental pleadings to applicant's Petition for Removal, but are separate pleadings seeking relief from the district office. We therefore will not address these pleadings and defer to the trier of fact to address these in the first instance.

IV.

Although the decision contains a finding that is final, applicant is only challenging an interlocutory finding/order in the decision regarding whether defendant may be relieved from the agreement to Dr. Kipperman as the psychiatric AME. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Section 4062.3 provides in relevant part, as follows:

> (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.
> …
> (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(c) & (f)-(g).)

In *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc), the Appeals Board expressly stated that the parties are prohibited from ex parte communication with the QME. (*Id.* at p. 1809.) The decision cited to the definition of "ex parte" previously outlined in *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136 (Appeals Board en banc):

> 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.*, [emphasis added].)

(*Id.* at p. 142.)

In *Maxham*, the Appeals Board found that "[b]ecause defendants' counsel was copied on all communications with the AMEs, those communications cannot be said to be 'ex parte'." (*Id.*)

Section 4062.3(g) also prohibits ex parte communication with an AME. Applicant's attorney served defendant's Petition to be Relieved of AME Agreement on the AME Dr. Kipperman without copying defendant. This was an improper ex parte communication with the AME.

Section 4062.3(g) expressly provides for a new evaluation if there is an ex parte communication with the AME and the aggrieved party elects to terminate the evaluation. (*Suon*, *supra*, 83 Cal.Comp.Cases at p. 1814.) The aggrieved party must exercise its right to terminate the evaluation and seek a new evaluation within a reasonable time following discovery of the prohibited communication. (*Id.* at p. 1815.)

Defendant learned of applicant's ex parte communication with Dr. Kipperman in November 2019 and filed its Additional Grounds for Petition to be Relieved of AME Agreement in January 2020. Defendant as the aggrieved party has the right to terminate the evaluation and seek a new evaluation due to applicant's ex parte communication, and the evidence supports that defendant exercised this right within a reasonable time.

Applicant contends that it was permissible to send defendant's Petition to Dr. Kipperman pursuant to section 4062.3(f). Section 4062.3(f) permits parties to communicate with an AME regarding "nonsubstantial" matters. Applicant forwarded to Dr. Kipperman a pleading impugning Dr. Kipperman's work as a medical-legal evaluator and seeking to have him removed as the AME. We cannot plausibly characterize this communication as "nonsubstantial" as that word is used in section 4062.3(f).

Applicant also contends that he was permitted to send defendant's Petition to Dr. Kipperman per the parties' February 27, 2019 stipulations regarding what will be sent to the AME. The stipulations stated that the parties would exchange advocacy letters and that *defendant* would send the records to applicant's attorney and both doctors prior to the evaluations. There is no language in these stipulations that can reasonably be interpreted as permitting applicant to send defendant's Petition to Dr. Kipperman without serving defendant.

Therefore, we agree with the WCJ's conclusion that Dr. Kipperman must be replaced as the AME.

However, the current record does not reflect a basis to strike all of the psychiatric AME's reporting and deposition transcripts from the record. Statutory and case law favor the admissibility of medical reports provided they were obtained in accordance with the Labor Code. (See Lab. Code, §§ 4064(d), 5703(a), 5708; e.g., *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209].) Medical reports may be deemed inadmissible due to a party's ex parte communication with the medical-legal evaluator prior to issuance of the report (see e.g., *State Farm Ins. Co. v. Workers' Comp. Appeals Bd*. (*Pearson*) (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69] [the Court of Appeal found that the reports of an independent medical examiner should have been stricken because the applicant engaged in ex parte communication with the examiner prior to the evaluation]), or where a report is obtained from a private expert *solely* to rebut the opinion of the panel qualified medical evaluator (see e.g., *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]).

Here, the only report tainted by applicant's ex parte communication with Dr. Kipperman is the November 16, 2019 report issued in response to defendant's Petition to be Relieved of AME Agreement. Based on the current record, it was improper to strike all of the psychiatric AME's reports and deposition transcripts from the record.

In our new decision, we will remove Dr. Kipperman as the AME due to applicant's ex parte communication and strike only Dr. Kipperman's November 16, 2019 report as inadmissible.

V.

The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence or when necessary to adjudicate the issues in dispute. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Per *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 142 (Appeals Board en banc), the preferred procedure for developing a deficient record is to first allow supplementation of the medical record by the physicians who have already reported in the case. "If the use of physicians new to the case becomes necessary, the selection of an agreed medical evaluator (AME) by the parties should be considered at this stage in the proceedings." (*Id.*) The *McDuffie* decision concludes that "if none of the procedures outlined above is possible, the WCJ may resort to the

appointment of a regular physician, as authorized by Labor Code section 5701." (*Id.* at pp. 142-143.)

Dr. Kipperman must be removed as the psychiatric AME per the discussion above. Since the parties no longer have an AME, the WCJ properly exercised his discretion to develop the record by appointing a regular physician to evaluate the psychiatric component of the claim per section 5701. Therefore, we will retain the order appointing Dr. Allen to replace Dr. Kipperman in our new decision. We will also retain the order requiring the parties to engage with Dr. Allen pursuant to the statutes and regulations governing an AME.

VI.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it.

As discussed above, a QME or AME may be replaced where there is an improper ex parte communication by a party with the medical-legal evaluator. Additionally, Administrative Director (AD) Rule 31.5(a) enumerates 16 circumstances under which a party may request a replacement QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).)

One of the issues at trial was whether Dr. Xeller should be replaced as the QME. There is no evidence in the record reflecting an improper ex parte communication with Dr. Xeller or a basis to replace him as the QME per AD Rule 31.5(a). In the absence of substantial evidence to support replacing Dr. Xeller as the QME, we find no basis to remove him as the orthopedic evaluator. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions by the Appeals Board must be based on admitted evidence].)

In the F&O, the WCJ identified issues for determination that are not reflected in the June 30, 2020 Minutes of Hearing and Summary of Evidence or the December 28, 2020 Order. This included whether the reports of Dr. Auerbach or Dr. Kipperman should be sent to Dr. Xeller, and

whether defendant may send a previously drafted cover letter to Dr. Xeller. The record does not reflect that these issues were included among the issues to be adjudicated at trial. Therefore, we will not address these issues in our new decision in order to ensure all parties receive due process including notice and an opportunity to be heard before a decision adverse to a party's interests is made. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) The WCJ retains the authority to address disputes between the parties regarding what information to provide to the QME or AME. (*Suon*, *supra*, 83 Cal.Comp.Cases at pp. 1813-1814.)

In conclusion, we will grant reconsideration, rescind the F&O and issue a new decision finding that Dr. Kipperman is removed as the psychiatric AME due to applicant's ex parte communication with him. We will also find that there is no basis to replace Dr. Xeller as the orthopedic QME. Only Dr. Kipperman's November 16, 2019 report tainted by applicant's attorney's ex parte communication will be found inadmissible. We will order the parties to proceed with an evaluation with Dr. Allen for the psychiatric aspect of the claim per section 5701 and continue discovery with Dr. Xeller for the orthopedic parts.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Orders and Opinion on Decision issued by the WCJ on January 28, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Orders and Opinion on Decision issued by the WCJ on January 28, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. David Miller, while employed on 2/16/2006 as an equipment operator, by Mohler Brothers, sustained an injury arising out of and in the course of employment to his right knee.

2. At the time of the injury, the employer's workers' compensation carrier was State Compensation Insurance Fund.

3. Dr. Kipperman is removed as the psychiatric AME due to applicant's ex parte communication with Dr. Kipperman.

4. Dr. Kipperman's November 16, 2019 report (Joint Exhibit XXXX) is inadmissible.

5. There is no basis to replace Dr. Xeller as the orthopedic QME.

ORDERS

IT IS ORDERED that the parties utilize Dr. Ann Allen to evaluate the psychiatric claim per section 5701. The parties must provide records and communicate with Dr. Allen pursuant to the statutes and regulations governing AMEs.

IT IS FURTHER ORDERED that Dr. Xeller remains the orthopedic QME and the parties must conduct further discovery on the orthopedic parts with Dr. Xeller.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2021

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

DAVID MILLER
LAW OFFICES OF MICHAEL LINN
STATE COMPENSATION INSURANCE FUND

AI/*pc*

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