WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LON MARTINSEN, *Applicant*

vs.

H&H ENTERPRISES, INC.; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ7436343
Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Award and Orders (FA&O) issued by the workers' compensation administrative law judge (WCJ) on June 2, 2022.[2] By the FA&O, the WCJ found that the panel qualified medical evaluator's (QME) office engaged in ex parte communication with applicant's attorney's office in violation of Labor Code[3] section 4062.3. (Lab. Code, § 4062.3.) The QME's reports were ordered inadmissible and stricken from the record. The QME was removed from the case and the Medical Unit was ordered to issue a new QME panel in psychology. Discovery was reopened on all issues.

Applicant contends that the QME did not engage in ex parte communication with his attorney and that the contact between the offices was insignificant and inconsequential. Applicant further contends that starting over with a new QME is a severe repercussion and that discovery should not be reopened on all issues.

We received an answer from defendant. Applicant filed a supplement pleading explaining his error in serving the Petition on the incorrect defense firm. We accept applicant's supplemental pleading pursuant to WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964.) The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that

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[1] Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.
[2] The WCJ had previously issued a decision on this matter on August 24, 2020 and he reissued the same decision following resubmission of the matter. The reissued decision was served on the parties on June 2, 2022.
[3] All further statutory references are to the Labor Code unless otherwise stated.

applicant's Petition be denied.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer, applicant's supplemental pleading 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 rescind the FA&O and issue a new decision finding that there is no basis to replace Dr. Madrid as the panel QME. All other issues in dispute will be deferred.

FACTUAL BACKGROUND

Applicant claims injury to his bilateral upper extremities and psyche on April 5, 2010 while employed as a graphics printer by H&H Enterprises, Inc.

Applicant was evaluated by two QMEs: Dr. Robert Bruckman in orthopedics and Dr. Antonio Madrid in psychology. Both physicians have evaluated applicant and issued several reports.

On June 8, 2016, defendant sent a letter to Dr. Madrid enclosing surveillance videos of applicant and requesting a supplemental report. (Defendant's Exhibit A, Defendant's Request for Supplemental Report from Antonio Madrid, Ph.D., June 8, 2016.) In response, Dr. Madrid sent a letter to both parties stating in pertinent part:

> I seem to have read somewhere that non-medical information supplied to the QME has to be approved by both parties. If that is the case, I need to have Mr. Bloom approve of these videos. If it is not the case, I merely need to be informed by both parties that my viewing of the videos and addressing Mr. Lanterman's question are appropriate.
>
> (Defendant's Exhibit D, Correspondence from Antonio Madrid, Ph.D., June 29, 2016.)

Applicant's attorney sent a letter to Dr. Madrid confirming that he should review the surveillance videos and issue a supplemental report. (Defendant's Exhibit E, Correspondence from Applicant's Attorney to Antonio Madrid, Ph.D., July 7, 2016.)

On September 14, 2016, Dr. Madrid sent a letter to both parties stating:

> The defendant requested a supplemental report on Mr. Martinson and sent me a set of videos of the injured worker, asking me to comment on my GAF and whether I would change that based on the video. I have not been able to respond to this request.

> My office in Monte Rio burned down. In the aftermath of the fire, reconstruction, and relocation, the videos could not be found. I failed to contact the defendant's office with this information. Instead, my office phoned Mr. Bloom's office asking for copies of the videos, telling them of the office fire. The videos have not been received. Obviously, we should have contacted the defendant's office for a replacement video.
>
> (Defendant's Exhibit J, Correspondence from Antonio Madrid, Ph.D., September 14, 2016.)

On September 16, 2016, defendant submitted replacement panel requests in both QME specialties to the Medical Unit. (Defendant's Exhibit G, Defendant's Replacement Psychology Panel Request, September 16, 2016; Defendant's Exhibit H, Defendant's Replacement Hand Panel Request, September 16, 2016.) In both requests, defendant sought a replacement panel due to late reporting in response to its requests for supplemental reports from the QMEs. (*Id.*)

On September 21, 2016, applicant filed a Petition Preserving Qualified Medical Evaluator Status arguing that the two QMEs should not be replaced for failure to issue a supplemental report within 60 days. Applicant also filed a declaration of readiness to proceed (DOR) on the same date.

The matter initially proceeded to trial on November 14, 2016 on the sole issue of whether replacement QME panels should be issued in both specialties based on late reporting from the QMEs. (Minutes of Hearing and Summary of Evidence, November 14, 2016, p. 2.) In his February 10, 2017 Findings and Order, the WCJ found that both doctors should continue to serve as the QMEs.

Defendant sought removal of the February 10, 2017 Findings and Order. We denied defendant's Petition in our September 15, 2017 Opinion and Order Denying Petition for Removal.

The matter proceeded to trial again on December 3, 2018 on several issues including parts of the body injured, permanent disability, occupational code, need for further medical treatment and applicant's costs for his vocational expert in the amount of $2,175. (Minutes of Hearing and Summary of Evidence, December 3, 2018, pp. 2-3.) Applicant testified at trial as follows in pertinent part:

> When he was evaluated by Dr. Madrid, they went out to lunch during the evaluation, and Dr. Madrid cut his hamburger for him.
>
> (*Id.* at p. 9.)

In light of applicant's trial testimony, defendant filed a Petition to Disqualify and Replace

Panel Qualified Medical Evaluator on December 24, 2018. On January 4, 2019, the WCJ issued an Order Vacating Submission and Order to Further Develop the Record. The parties were ordered to develop the record on the nature of the communications between applicant and Dr. Madrid.

Dr. Madrid was cross-examined on April 5, 2019. He testified as follows in relevant part:

> Q. Okay. Let's say it this way, then: All of your evaluations of Mr. Martinsen, did they occur within this building?
>
> A. Yes. Within this building and also at the coffee shop.
>
> Q. Is that perhaps the Bia's coffee shop?
>
> A. Yes.
>
> Q. Just across the way, with a colorful gal?
>
> A. The coffee shop or the restaurant across the street.
>
> Q. Which is it?
>
> A. Probably both. I always take a patient that I'm evaluating over for a cup of coffee or sandwich and continue to interview them.
>
> Q. So that's common across all workers' compensation evaluations, all non-workers compensation evaluations?
>
> A. Pretty much.
> …
> A. Are you saying that it's too far to offer somebody a sandwich, or it's too far to walk across the street and give them a donut? Is that what you are saying?
>
> Q. What do you think is too far?
>
> A. I don't think that's too far.
>
> Q. Why not?
>
> A. It's a way of learning more about the patient. Getting them into a relaxed environment and giving them a sandwich helps me to see how they are acting socially, helps me to see how they deal when their defenses are down.
>
> And I'm taking notes all the time while I'm talking to them. It helps me to get them to speak more in a more relaxed fashion about their work history, about their family. It gives them a break.

> Many of these patients come from two, three hours away. They are here going through this ordeal, which is an important ordeal for them, and they're tired and hungry, and I help relax them.
>
> (Defendant's Exhibit CC, Deposition transcript of Dr. Madrid, April 5, 2019, pp. 28-29, 39-40.)

Dr. Madrid denied communicating directly with applicant's attorney about this case. (*Id.* at pp. 46-48.)

Both parties subpoenaed Dr. Madrid's records after the deposition. (Defendant's Exhibit DD, Defendant's Subpoena Duces Tecum of Antonio Madrid, Ph.D., April 15, 2019; Defendant's Exhibit EE, Applicant's Subpoena Duces Tecum of Antonio Madrid, Ph.D., May 3, 2019.) The records obtained by applicant in response to his subpoena included this note:

> 9/23/16
>
> John Bloom's office: Legal assistant or para legal who is working on Lon Martinson's case. 524-1144.
>
> > We got your Petition preserving Dr. Madrid as the QME and your declaration of readiness to proceed. We also got copies of the videos that he was requested to review and do a supplemental report.
> >
> > Please let us know when and how to proceed on this.
>
> (Defense Exhibit AAA, Applicant's subpoenaed records of Antonio Madrid, Ph.D., part 4 at Bates Stamp page 00345.)

This note was not contained in the records provided by Dr. Madrid in response to defendant's subpoena. (Defendant's Exhibit GG, Defendant's subpoenaed records of Antonio Madrid, Ph.D. (160 pages), June 11, 2019.)

The matter proceeded to a status conference on August 14, 2019, at which the WCJ ordered Dr. Madrid to appear and produce handwritten notes in relation to this case. (Minutes of Hearing and Order, August 14, 2019.) Defendant sought removal of the August 14, 2019 order. We denied defendant's Petition in our October 16, 2019 Opinion and Order Denying Petition for Removal.

At the subsequent hearing on December 12, 2019, the Minutes of Hearing reflect that "Dr. Madrid appeared today and provided additional documents which will be admitted." (Minutes of Hearing, December 12, 2019.) The matter again proceed to trial on February 11, 2020, at which

time multiple additional exhibits were offered by both parties. (Minutes of Hearing, February 11, 2020.) Additional issues to be adjudicated were identified as:

> 1. Defendant's petition to disqualify and replace panel Qualified Medical Evaluator Dr. Madrid, filed December 21, 2018, which includes the issue of whether or not Dr. Madrid engaged in ex parte communications with the applicant.
>
> 2. Whether or not Dr. Madrid should be disqualified due to ex parte communications with the applicant's attorney.
>
> 3. Whether or not a person aware of the facts would reasonably entertain doubt as to Mr. Madrid's integrity and impartiality pursuant to QME rule 41.5(d)(4).
>
> (*Id.* at p. 2.)

Exhibits identified for submission by defendant included Exhibit GG, identified as "Defendant's subpoenaed records of Anthony Madrid, Ph.D. (160 pgs), dated 6/11/2019." (*Id.* at p. 5.) A copy of this exhibit was not identified in the Electronic Adjudication Management System (EAMS).

At a subsequent March 11, 2020 status conference, the WCJ issued an order quashing defendant's subpoenas of six employees of Gemini Duplication, which is the copy service that was used by applicant's attorney to subpoena Dr. Madrid's file. Defendant sought removal of the WCJ's March 11, 2020 order. We denied defendant's Petition on May 6, 2020.

The matter once again proceeded to trial on May 28, 2020 with the following additional issues identified:

> 1. Whether or not Dr. Madrid should be replaced as panel QME for violation of Labor Code section 4062.3.
>
> 2. Whether or not Dr. Madrid should be replaced for violation of Board Rule 41.5.
>
> (Minutes of Hearing and Summary of Evidence, May 28, 2020, p. 2.)

The WCJ initially issued a Findings, Award and Orders on August 24, 2020, which mirrors the current FA&O. Applicant sought reconsideration or in the alternative removal of the WCJ's August 24, 2020 decision.

In our April 22, 2022 Opinion and Decision After Reconsideration, we rescinded the August 24, 2020 Findings, Award and Orders because defendant's Exhibit GG had not been made

part of the evidentiary record although it was identified as a trial exhibit. The matter was returned to the trial level to obtain a complete record.

Following return of this matter to the trial level, the parties appeared before the WCJ on May 17, 2022. The WCJ admitted defendant's Exhibit GG into the record over applicant's objection and the matter was ordered resubmitted for decision. (Minutes of Hearing, May 17, 2022, p. 2.) The FA&O was reissued as outlined above.

In his Report, the WCJ explained the rationale for the decision as follows:

> This court finds that Dr. Madrid's communication with applicant's attorney on September 23, 3016 was a communication regarding substantial issues, to wit, whether or not to proceed to provide a supplemental report. Despite the fact that the parties had previously, jointly requested a supplemental report addressing the sub rosa video, for whatever reason, Dr. Madrid's office felt it was appropriate to contact the applicant's attorney for guidance on "when and how to proceed". This communication is not related to the scheduling or re-scheduling of an evaluation, the furnishing of records (as the records had already been received), or the availability of the report. It was not about "weather or traffic." This was a request for guidance from the applicant's attorney on how to proceed. This was therefore an improper ex parte communication.
>
> The court feels that this communication evidences, in the words of the *Alvarez II* court, a "willingness to initiate an ex parte communication with [applicant's] counsel" which is concerning. (*Alvarez II* at 828). Likewise, the fact that this phone call was documented, and then not disclosed to defendant, and was only discovered after applicant's counsel issued his own subpoena, is likewise concerning. In the final analysis, the court feels that this represents a prohibited ex parte communication, requiring the removal of Dr. Madrid as the psychological PQME is this case.
>
> (Report, July 12, 2022, pp. 7-8.)

DISCUSSION

I.

Applicant sought reconsideration of the FA&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 of injury AOE/COE to the bilateral upper extremities and psyche. 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.

II.

Although the decision contains a finding that is final, applicant is only challenging interlocutory decisions regarding the order striking the psychological QME's reporting and replacement of this QME. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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. (*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]; Cal. Code Regs., tit. 8, § 10955(a).)

The issue of whether there must be a new QME panel in psychology and exclusion of all of Dr. Madrid's reports 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 and if the current QME's

reports may be admissible in further proceedings.

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) and (i).)

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

> 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 . . . .
>
> (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.
>
> (*Id.* at p. 587.)[4]

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.

We agree with the WCJ that the QME's lunch with applicant during the course of his examination was not an ex parte communication. The QME persuasively explained that he has a meal with an employee during a medical-legal examination to facilitate solicitation of information in order to address the relevant medical-legal issues. The lunch qualifies as a communication under section 4062.3(i) and is thus exempt from the prohibition against ex parte communications.

With respect to the communication between the applicant's attorney's office and the QME's office on September 23, 2016, the Court of Appeal acknowledged in *Alvarez* that "an ex parte communication may be so insignificant and inconsequential that any resulting repercussion would be unreasonable." (*Alvarez*, *supra*, 187 Cal.App.4th at p. 590.) The Court further acknowledged that a "certain amount of informality is anticipated in Workers' Compensation Act proceedings," which may be considered when applying section 4062.3. (*Id.*)

Despite defendant's sustained efforts to depict improper communication between the QME and applicant's attorney, the record reflects that the September 23, 2016 communication was a simple request for clarification on when and whether Dr. Madrid should review the surveillance videos and issue a supplemental report. This communication was two days after applicant filed his Petition Preserving Qualified Medical Evaluator Status and DOR in response to defendant's replacement panel requests for both QMEs. The note memorializing the QME's conversation with applicant's attorney's assistant expressly acknowledged receipt of applicant's pleadings and requested to "know when and how to proceed." This note indicates Dr. Madrid logically understood his continued involvement in the case was uncertain at that time since defendant was attempting to replace him as the QME. This is a reasonable request for clarification on whether and when to review the videos and issue a supplemental report rather than a nefarious attempt to conspire with applicant's attorney. Moreover, this communication was with applicant's attorney's

[4] 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.

assistant and the record is unclear if Dr. Madrid himself actually made this phone call or if a member of his staff did so.

Although we recognize that the QME should communicate simultaneously with both parties to avoid an ex parte communication, the September 23, 2016 phone call was insignificant and inconsequential. Therefore, the record does not support the remedy of replacing the QME.

We will issue a new decision finding that there is not a basis to replace the QME and include an order denying defendant's Petition to Disqualify and Replace Dr. Madrid.

III.

Applicant also challenged the WCJ's order reopening discovery on all issues. A WCJ has broad authority to issue orders to ensure proper adjudication of each claim, including "any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case." (Cal. Code Regs., tit. 8, § 10330.) This includes the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].)

The WCJ acted within his discretion to reopen discovery on all issues and further discovery may be warranted in order to ensure there is substantial evidence in the record to address the issues still in dispute. We will thus retain the order reopening discovery in the new decision.

It is noted that this matter has been before the Appeals Board several times and there has been protracted litigation regarding discovery with limited progress on resolution of this matter. It is unclear how persistent litigation over discovery disputes serves the interests of either party. We urge the parties to advance discovery and resolution of this matter. The WCJ may exercise his discretionary authority to facilitate the case's progress as he deems warranted and in accordance with the Labor Code.

Applicant does not contest the other findings of fact or orders in the WCJ's decision besides the finding and order regarding Dr. Madrid. Defendant did not challenge the FA&O. Therefore, we will retain the other findings of fact and orders made by the WCJ regarding the other issues that were identified as in dispute. (See Lab. Code, § 5904.)

In conclusion, we will rescind the FA&O and issue a new decision finding that Dr. Madrid should not be replaced as the panel QME. The other issues still in dispute will be deferred.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Orders issued by the WCJ on June 2, 2022 is **RESCINDED** in its entirety and is **SUBTITUTED** with the following:

FINDINGS OF FACT

1. Lon Martinsen, while employed as a graphics printer, occupational code 230, on April 5, 2010 at Cotati, California by H&H Enterprises, Inc., sustained an injury arising out of and in the course of employment to the bilateral upper extremities and psyche.

2. At the time of the injury the employer's workers' compensation carrier was Zenith Insurance Company.

3. The reports of the orthopedic QME Dr. Robert Bruckman are substantial evidence.

4. The psychological QME Dr. Antonio Madrid did not engage in ex parte communication with applicant in violation of section 4062.3 or violate AD Rule 41.5, and there is no basis for a replacement psychological panel.

5. Applicant is in need of future medical care to cure or relieve from the effects of his injury.

6. Costs incurred in connection with applicant retaining vocational expert Frank Diaz are reasonable and reimbursable by defendant.

7. All other issues are deferred.

AWARD

AWARD is made in favor of **LON MARTINSEN** against **H&H ENTERPRISES, INC.** and **ZENITH INSURANCE COMPANY** of:

Future medical treatment that is reasonably necessary to cure or relieve from the effects of the injury.

ORDERS

IT IS ORDERED that defendant's Petition to Disqualify and Replace Dr. Antonio Madrid as the psychological QME is denied.

IT IS FURTHER ORDERED that discovery is reopened on all issues.

IT IS FURTHER ORDERED that costs associated with applicant's retention of Frank Diaz as a vocational expert were reasonable and should be reimbursed by defendant. The parties are to resolve the issue of payment with jurisdiction reserved in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT. (See Attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 24, 2023

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

LAW OFFICE OF JOHN BLOOM
LON MARTINSEN
PURINTON, JIMENEZ, LABO & WU

AI/*pc*

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I would affirm the WCJ's decision, although I would amend the FA&O to solely remove from the record Dr. Madrid's reporting subsequent to the September 23, 2016 ex parte communication.

In *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 590 [75 Cal.Comp.Cases 817], the Court of Appeal held that section 4062.3(g) expressly prohibits ex parte communication with a panel QME. The Court further opined that "a violation of an unqualified prohibition on ex parte communications requires no showing of prejudice to invoke the appropriate remedy." (*Id.* at p. 589.) This "strict rule" against ex parte communication is justified in a field where "the impartiality and appearance of impartiality of the panel qualified medical evaluator is critical." (*Id.*)

Subsequent to *Alvarez*, in *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1809 (Appeals Board en banc), the Appeals Board held en banc that the parties are prohibited from ex parte communication with the QME pursuant to section 4062.3(g). 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.)

Pursuant to *Suon*, section 4062.3(g) provides for a new QME if there is an ex parte communication with the QME and the aggrieved party elects to terminate the evaluation within a reasonable time following discovery of the prohibited communication. (*Suon*, *supra*, 83 Cal.Comp.Cases at pp. 1814-1815.)

I agree with the WCJ's conclusion that the communication between Dr. Madrid's office and applicant's attorney's office on September 23, 2016 was an improper ex parte communication in violation of section 4062.3(g). It is unclear why Dr. Madrid sought clarification solely from applicant regarding "when and how to proceed" with respect to the sub rosa videos and supplemental report. Standing alone, this communication may appear inconsequential. However,

taken together with Dr. Madrid's office's earlier phone call with only applicant's attorney's office regarding the videos, Dr. Madrid's denial of documentation of the communication during his deposition, as well as the lack of disclosure of this documented communication to defendant in response to its subpoena, the evidence in the record is sufficient to tip the scale to reflect an appearance of impropriety by the QME that may only be remedied by a new physician. (See Defendant's Exhibit J, Correspondence from Antonio Madrid, Ph.D., September 14, 2016; Defendant's Exhibit CC, Deposition of Antonio Madrid, Ph.D., April 5, 2019, pp. 20-21; Defendant's Exhibit GG, Defendant's subpoenaed records of Antonio Madrid, Ph.D. (160 pages), June 11, 2019.) As stated above, the impartiality and appearance of impartiality of the panel QME is critical.

The record reflects that the aggrieved party (defendant) pursued a replacement panel within a reasonable time following discovery of the prohibited communication. The evidence supports the WCJ's order for a replacement QME panel in psychology because it is improper for Dr. Madrid to continue as the psychological panel QME under these circumstances. However, the current record does not reflect a basis to strike all of Dr. Madrid's reporting 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]).

The record contains several reports and deposition transcripts by Dr. Madrid prior to the improper ex parte communication on September 23, 2016. Based on the current record, it was improper to strike *all* of the QME's reports and deposition transcripts from the record. I would therefore amend the FA&O to revise order C to strike only those reports by Dr. Madrid that were issued subsequent to the ex parte communication. I would otherwise affirm the WCJ's decision.

Therefore, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 24, 2023

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

LAW OFFICE OF JOHN BLOOM
LON MARTINSEN
PURINTON, JIMENEZ, LABO & WU

AI/*pc*

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