WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN LICEA, ***Applicant***

vs.

SCREWMATIC;
INSURANCE COMPANY OF THE WEST, ***Defendants***

Adjudication Number: ADJ10568300
Los Angeles 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 Juan Licea seeks reconsideration of the May 21, 2021 Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that because "defendant has shown an 'articulable suspicion' existed that would support the decision to film applicant pursuant to Civil Code §1708.8," the sub rosa video taken of applicant may be submitted to the Qualified Medical Examiner (QME) for review. (F&O, Finding of Fact No.3.)

Applicant contends that because defendant "ha[s] not and cannot provide any articulable suspicion that Applicant has done any illegal activity or misconduct prior to the video," sub rosa video of applicant should not be submitted to the QME. (Petition for Reconsideration (Petition) at 4:1.)

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

We have considered the Petition, 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 May 21, 2021 F&O, and substitute Findings of Fact, which find that Civil Code section 1708.8 is

inapplicable in these proceedings, and order the parties to meet and confer to prepare a neutral cover letter to QME Dr. Georgis, and order the submission of the sub rosa films to the QME for review pursuant to Labor Code section 4062.3(a)(2).

FACTS

Applicant claimed injury to various body parts while employed as a machine operator on August 10, 2016. (March 17, 2021 Minutes of Hearing and Summary of Evidence (MOH) at 2:3.) Theodore Georgis, M.D., acted as the orthopedic QME in this matter. (See Exhibits 1, 3, and H, E-mail Exchanges; Exhibit F, Deposition Transcript of Theodore Georgis, M.D., November 19, 2020.)

Between November 2, 2020 and November 5, 2020, defendant obtained sub rosa video footage of applicant. (March 17, 2021 MOH, at 4:12-13.)

On November 12, 2020, defendant disclosed the existence of the sub rosa video to applicant, served a copy of the video on CD-ROM, and proposed its submission to QME Dr. Georgis for review. (Ex. B, Applicant's Objection Letter, dated November 23, 2020.) Applicant formally objected to its admissibility on November 23, 2020, citing "foundation, authentication and the rule of completeness under Evidence Code sections 356, 402-403, 1400-1401." (*Ibid*.) Applicant further objected to the proposed letter to the QME under Labor Code section 4062.3. Applicant demanded disclosure of the details incidental to the surveillance footage, and indicated the issue would be re-addressed following receipt of the requested information. (*Ibid.*)

On November 23, 2020, defendant filed a Declaration of Readiness to Proceed to expedited hearing regarding the medical-legal discovery dispute. The parties appeared at the expedited hearing on December 17, 2020. The WCJ converted the hearing to a mandatory settlement conference, and set the matter for trial.

The parties appeared at trial on March 17, 2021. The issues framed for decision were whether Civil Code section 1708.8 bars defendant from showing sub rosa film of applicant to QME Dr. Georgis absent a showing of an articulable suspicion, whether Civil Code section 1708.8 applies in workers' compensation cases, and whether defendant may send their advocacy letter of December 1, 2020 to Dr. Georgis. (March 17, 2021 MOH, at 2:7.)

Defense witness David Lopez testified that he was the investigator who personally captured the sub rosa video of applicant. Mr. Lopez described the circumstances surrounding his filming:

> His procedure is to drive to the residence and conduct surveillance from his vehicle. Once he sees the person, he turns his camera on. He then follows that person until they return to the home. In this case, he only captured 4 minutes of film on 2 November, 2 minutes of film on 4 November and about 13 minutes of film on 5 November. He reviewed footage prior to today. He believes Mr. Licea is the same person as in the virtual courtroom. The film accurately shows the surroundings and Mr. Licea. Mr. Licea is in the video.
> …
> He captured Applicant returning home on 2 days but not when he left. He only turned the camera on when he saw Mr. Licea. He only saw him out of the house for 19 minutes, 39 Seconds. Witness never obtained the consent from Applicant. (March 17, 2021 MOH, at 4:14-20; 6:23-25.)

The WCJ reviewed the surveillance footage. (March 17, 2021 MOH, 4:23 to 6:6.) As relevant herein, the WCJ summarized the video as depicting the following: On November 2, 2020, applicant in front of his home, moving trash cans, carrying trash cans from the street to the driveway, picking some fruit, and entering his home through the front door. On November 4, 2020, applicant driving from his driveway to the street, parking the car and walking to his front door, and three passengers exiting the vehicle. (*Id*. at 5:7.) On November 5, 2020, applicant parking his SUV and washing it, retrieving a stool from within the home, and later returning it, returning to the vehicle and driving the vehicle. (*Id.* at 5:21.*)* On the same day, applicant exiting a mini-market and driving from the mini-market. Applicant with a woman in front of his house near the vehicle, the woman entering the vehicle on the driver's side, applicant entering on the passenger-side. Applicant getting out of the vehicle and returning with a cane, and getting back into the vehicle. Applicant walking with the woman, in what appears to be a parking lot, and returning to the vehicle. (*Id*. at 6:3.) Finally, applicant near the citrus tree in his front yard near the front door. (*Id.* at 6:5.)

Mr. Lopez also testified that he used a camera with a zoom feature, and that the films captured persons in addition to applicant. (March 17, 2021 MOH, at 7:1.)

Trial was continued to April 22, 2021. As relevant herein, applicant testified that the video shows his residence in Glendora, and did not deny that he was the individual identified in the video. (April 22, 2021 MOH, at 2:22-4:11.) Two of his grandchildren, Abner (age 14) and

Alessandra (age 15) are in the video from November 2, 2020. (*Id*., at 2:13-14.) The WCJ summarized applicant's testimony as follows:

> When asked whether the investigator came on to his property he said yes. He then clarifies that the investigator was walking in front of his house not on his property. He was about 15 steps away from the witness. He agrees with the Defense Attorney that this was 15 feet.
> …
> The investigator was close to his house. He knows it was the investigator because [the investigator] was looking at the witness' house and looked very suspicious. This was the same Mr. Lopez who testified at the last trial. (MOH, at 4:21-23; 5:3-5.)

The WCJ issued the F&O on May 21, 2021. The WCJ determined, in relevant part, that defendant had met its burden of establishing an "articulable suspicion" that would "support the decision to film applicant pursuant to Civil Code § 1708.8." (F&O, Finding of Fact No. 3.) The parties were ordered to provide the film to QME Dr. Georgis for review and comment. (F&O, Order No. 1.)

DISCUSSION

Applicant contends that certain provisions of the Civil Code create an evidentiary bar in these workers' compensation proceedings.

The California workers' compensation system was intended by the legislature to be a complete system, as described in Divisions 4 and 5 of the Labor Code. Labor Code section 3201 provides:

> This division and Division 5 (commencing with Section 6300) are an expression of the police power and are intended to make effective and apply to a complete system of workers' compensation the provisions of Section 4 of Article XIV of the California Constitution.

Article XIV provides in relevant part that "administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character. . ." (Cal.Const., art XIV, § 4.) Thus, under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court of limited jurisdiction that reviews and decides appeals from decisions issued by workers' compensation administrative law judges. (Cal. Const., art. XIV, § 4; §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.; *Bankers Indemnity Ins. Co. v. Industrial Acc. Com.* (1935) 4 Cal.2d 89; *Fremont Indemnity v. Workers'*

Comp. Appeals Bd. (1984) 153 Cal.App.3d 965 [49 Cal.Comp.Cases 288]; *Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376 [57 Cal.Comp.Cases 391] ["[t]he WCAB . . . is a constitutional court"].)[1]

In *Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1087-1088 [80 Cal.Comp.Cases 1262], the Court of Appeal explained that: "The state Constitution gives the Legislature 'plenary power…to create…and enforce a complete system of workers' compensation.' (Cal. Const., art. XIV, § 4.) Acting under this power, the Legislature enacted the workers' compensation law to govern compensation to California workers who are injured in the course of their employment. (§ 3201 et seq.)."[2] Consequently, the right to workers' compensation benefits is wholly statutory. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 389 [58 Cal.Comp.Cases 286]; *Graczyk, supra*, 184 Cal.App.3d at pp. 1002-1003.)

Participation in the workers' compensation system is compulsory. (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 732 [76 Cal.Comp.Cases 1282]; see *Vacanti, supra*, 24 Cal.4th at pp. 812-814; *Noe v. Travelers Ins. Co.* (1959) 172 Cal.App.2d 731, 734-735 [24 Cal. Comp.Cases 189] [emphasizing that workers' compensation is an exclusive remedy].) "The workers' compensation law requires employers to secure the payment of workers' compensation benefits either by purchasing third party insurance or by self-insuring with permission from the Department of Industrial Relations." (*Stevens*, supra, 241 Cal.App.4th at p. 1087 [citing § 3700 and *Denny's Inc. v. Workers' Comp. Appeals Bd.* (2003) 104 Cal.App.4th 1433, 1439 [68 Cal.Comp.Cases 1].)

The workers' compensation system "was intended to afford *a simple and nontechnical path* to relief. (Italics added.)" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624]

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[1] Under this constitutional grant of plenary power to the Legislature, the California Workers' Compensation Act (§ 3200 et seq.) was enacted "to establish a complete and exclusive system of workers' compensation including 'full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State . . . .'" (*Crawford v. Workers' Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 163 [54 Cal.Comp.Cases 198] citing Cal. Const., art. XIV, § 4; § 3201; *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002 [51 Cal.Comp.Cases 408].)

[2] "The underlying premise behind this statutorily created system … is the '"compensation bargain[,]"' … [under which] 'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. (Italics added.)'" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 [65 Cal.Comp.Cases 1402].)

citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.) In order to further the goal of expeditious adjudication of disputes, informal rules of pleading apply to workers' compensation proceedings. (See Cal. Code Regs., tit. 8, former § 10397, now § 10617 (eff. Jan. 1, 2020); *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal. App. 3d 1452, 1456 [52 Cal. Comp. Cases 141]; see also *Claxton v. Waters* (2004) 34 Cal. 4th 367, 373 [69 Cal.Comp.Cases 895]; *Sumner v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972, 973 [48 Cal.Comp.Cases 369].)

The Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (*Barr v. Workers' Compensation Appeals Bd.*, 164 Cal. App. 4th 173, 178 [73 Cal. Comp. Cases 763].) Labor Code section 5708 states:

> All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.

Labor Code section 5709 further provides:

> No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

"[T]aken together, sections 5708 and 5709 allow the WCAB considerable discretion to conduct its business in a manner quite unlike civil litigation; in fact, the WCAB is unencumbered by formality or traditional rules of evidence and procedure." (*Barr v. Workers' Compensation Appeals Bd.*, *supra*, at 178.)

Applicant contends that California Civil Code section 1708.8 applies in these proceedings, and requires a showing of an "articulable suspicion" on the part of defendant to justify the decision to obtain sub rosa surveillance video. Applicant contends that because defendant failed to articulate

its suspicions either prior to the surveillance, or at the subsequent evidentiary hearing, the sub rosa video taken of applicant was impermissibly obtained and may not be submitted to the QME.

Enacted in 1998, Civil Code section 1708.8 was introduced in the wake of the death of Lady Diana, Princess of Wales following a high speed vehicular chase by paparazzi, as a curb on the "aggressive and often dangerous paparazzi-like behavior of tabloid journalists." (*Richardson-Tunnell v. School Ins. Program* (2007) 157 Cal. App. 4th 1056 (72 Cal. Comp. Cases 1612).) The statute "imposes *liability* for an invasion of privacy with the intent to capture a visual image, sound recording or other physical impression of the plaintiff engaging in a personal or familial activity; as a remedy, it provides treble damages as well as disgorgement of profits." (*Ibid*., *emphasis added.*) "[I]t is clear the legislature intended to prevent paparazzi, photographers or other journalists from invading the privacy of individuals and then selling the images unlawfully obtained by stealth…The statute addresses the sale or broadcast of images or recordings obtained by invading plaintiff's privacy." (*Turnbull v. ABC*, No. CV 03-3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351, at *72-74.). The statute creates civil liability for the invasion of privacy, either actual (subsection (a)), or constructive (subsection (b)). The statute defines the nature and scope of damages that can be recovered, and the rights and remedies available to persons whose privacy has been unlawfully infringed (subsections (d), (e) and (h)).

However, while the statute creates a *civil* cause of action for recovery of damages, it does not create an evidentiary standard of admissibility in workers' compensation proceedings. Civil Code section 1708.8 is framed in terms of civil liability, not evidentiary preclusion.

This was among the holdings in *Duong v. Automobile Club of Southern California* (October 7, 2014, ADJ1479326 [ANA 0411799], ADJ7233578) [2014 Cal. Wrk. Comp. P.D. LEXIS 492], a case involving sub rosa video taken of an applicant in the parking lot of a mobile home park and in a grocery store.[3] Therein, we observed that "[t]he proceedings before us do not pertain to civil tort liability but rather the admissibility of evidence before the Appeals Board, [t]herefore, Civil Code section 1708.8 appears to be inapplicable." (*Duong*, *supra,* at 10.) Because

[3] 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 *Duong* because it considered a similar issue.

Civil Code section 1708.8 was inapplicable, and because applicant had no reasonable expectation of privacy in the parking lot of a mobile home park, or in a grocery store, the sub rosa video of applicant in *Duong* was admissible and could be provided to the QME in that case. In the present matter, applicant seeks to distinguish *Duong* by asserting that the surveillance films depict applicant while he was in his front yard, a place where applicant had a reasonable expectation of privacy. (Applicant's Trial Brief, dated May 10, 2021, at 4:23.) However, applicant's argument seeks to distinguish *Duong* on the specific circumstances under which the sub rosa video was taken (i.e. in the front yard of his home), but fails to address the threshold question of why a civil liability statute would serve as an evidentiary bar in workers' compensation proceedings.

In the absence of a persuasive argument for why a civil tort statute would serve to bar evidence in a collateral administrative law proceeding, or how such a statute would interact with the relaxed evidentiary posture of workers' compensation proceedings, we discern no compelling argument to read Civil Code section 1708.8 as creating an evidentiary threshold herein. Accordingly, we conclude that Civil Code section 1708.8 is inapplicable to these proceedings.[4]

However, and notwithstanding the inapplicability of Civil Code section 1708.8, we further observe that applicant retains a constitutionally protected right to privacy. The California Constitution provides that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const. art. I, § 1.) However, the constitutional right to privacy is not absolute. The Supreme Court has defined the elements of a cause of action for violation of the constitutional right to privacy: "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) Moreover, even if

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[4] Although we conclude that Civil Code section 1708.8 is inapplicable as an evidentiary bar in workers' compensation proceedings, we also note that the Court of Appeal in *Richardson-Tunnell* discussed the statutory exemptions present for certain investigative activities: "After the 'articulable suspicion' language was added to Senate Bill 262 in August of 1998, legislative analysts continued to describe the bill as 'Exempt[ing] from the scope of these causes of action lawful activities of law enforcement of other governmental agencies *or other entities, public or private,* designed to obtain evidence of suspected illegal activity, insurance fraud, or a pattern of business practices which adversely affect the health or safety of the public.' (*Richardson-Tunnell v. School Ins. Program, supra*, 72 Cal. Comp. Cases 1612, 1618, *emphasis added*.) The question of whether the sub rosa video herein was obtained pursuant to such an investigative effort is not addressed substantively by either party, and we express no opinion in this regard.

the three elements are met, "no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests." (*Hernandez v. Hillsides, Inc.,* (2009) 47 Cal.4th 272, 287.)

Generally, there is no reasonable expectation of privacy in settings where activities are conducted in an open and accessible space, within the sight and hearing of the general public or of customers or visitors to that open and accessible space. (*Hernandez*, *supra*, 47 Cal.4th at p. 290; see also *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 448–449 [CyberCafe customers did not have legally protected privacy right in their activity on the premises].) The right to privacy in the front yard of a person's home is subject to the same considerations, including whether the activities are within the sight and hearing of the general public. The Court of Appeal discussed those privacy expectations in *People v. Mendoza* (1981) 122 Cal. App. 3d Supp. 12, a case involving an assertion of right to privacy in a yard enclosed by chain-link fence:

> In applying the principles of law to the cases which come before us, we should not lose sight of the everyday facts of life. Fencing around the front yard of a residence is a common situation and ordinarily includes a gate at the point where a sidewalk leads to the front door. Such fences have obvious purposes other than excluding the public, such as discouraging dogs, children, handbill deliverymen and others from walking across the front lawn and flower beds. In the absence of a locked gate, a high solid fence blocking the front yard from view, a written notice to keep out or "beware of dog," or perhaps a doorbell at the front gate, anyone having reason to talk to the residents would be expected to open the front gate, walk up to the house and knock on the door. Likewise, if a resident was in the front yard too far away from the fence to talk with easily, it would be entirely natural and appropriate to open the gate without asking permission and to approach the person in order to converse in normal tones. At least, this would be the case in the absence of a warning from the occupant that the visitor was unwelcome.
>
> There is simply no reasonable expectation of privacy in the front yard of a residence under such conditions. It is no more closed off to the public, expressly or impliedly, than any other front yard with a sidewalk to the front door. Even without a fence the public is not expected nor encouraged to walk wherever desired through the front yard; that's why a sidewalk is provided. The fact that a chain-link fence is installed is not commonly considered a deterrent to entering a front yard to the same extent as if unfenced, in the absence of other evidence to the contrary. (*Mendoza*, supra, at 14-15.)

Thus, there is no reasonable expectation of privacy in the front yard of a residence that is plainly visible from the street, absent additional indicia such as a high wall or a doorbell at the front gate. In the present matter, the investigator confirmed that his procedure involved capturing

surveillance from his vehicle on the street, and following the subject until they returned home. (March 17, 2021 MOH at 4:14.) Applicant testified that although the investigator walked in front of the house, he never came onto applicant's property. (April 22, 2021 MOH at 4:21.) On this record, it appears that the entirety of the surveillance footage defendant seeks to have reviewed by the QME depicts activity that was in plain view from the street or from the sidewalk. We are persuaded that applicant could not maintain a reasonable expectation of privacy under those circumstances.

We also address applicant's contention that the members of his family depicted in the video did not provide authorization to be included in the surveillance films. Applicant testified that his grandchildren were minors at the time of the filming, and that neither he nor his family members gave defendant "permission to film and use." (April 22, 2021 Minutes at 2:13; Applicant's Trial Brief, at 4:19.) However, to the extent that applicant avers his spouse and grandchildren are subject to an alternative privacy-related standard, applicant puts forth no authority for this contention. We observe that for the family members incidentally captured in the sub rosa films, just as with applicant himself, there is no reasonable expectation of privacy for conduct in the front yard of a home that is plainly visible from the street and sidewalk.[5]

Here, defendant's intention in obtaining the sub rosa films is for submission to the QME as part of the medical-legal evaluation process, pursuant to Labor Code section 4062.3(a)(2). Labor Code section 4062.3(a)(2) specifies that "any party may provide to the qualified medical evaluator selected from a panel any of the following information…Medical and nonmedical records relevant to determination of the medical issue." We have previously held that sub rosa video is "information" as contemplated by section 4062.3(a)(2), and that parties wishing to submit video evidence to a QME must comply with the notice and dispute resolution protocols of section 4062.3(b). (*Maxham v. California Dept. of Corr. and Rehab.* (2017) 82 Cal. Comp. Cases 136 [2017 Cal. Wrk. Comp. LEXIS 6] (Appeals Bd. en banc); see also *Martinez v. Allied Barton Security*, September 4, 2020, ADJ9202916 [2020 Cal. Wrk. Comp. P.D. LEXIS 289]; *Wan v.*

[5] With respect to applicant's contention that permission was required of family members and minors also appearing in the video, we note that Civil Code section 3344 provides for tort liability where any person "knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian." Here, any such concern is attenuated given the lack of commercial purpose in obtaining the sub rosa video, or in its potential review by a QME.

Community Health Network (San Francisco Gen. Hospital), April 13, 2015, ADJ5825581; ADJ9590533 [2015 Cal. Wrk. Comp. P.D. LEXIS 243].) Accordingly, it is permissible for a party to submit sub rosa video to the QME for the purpose of evaluating applicant's claimed injury and any resulting disability, and under the circumstances before us, we do not believe that the films were improperly obtained.

In summary, we conclude that Civil Code section 1708.8 describes the prerequisites to a *civil cause of action*, and is not an evidentiary bar in workers' compensation proceedings. We further conclude that although applicant retains a fundamental right to privacy under the California Constitution, applicant has not established a reasonable expectation of privacy for conduct in the front yard of a home that is plainly visible from the street and sidewalk or in the publically accessible parking lots where he was surveilled.

Accordingly, as our Decision After Reconsideration, we will rescind the May 21, 2021 F&O, and substitute Findings of Fact, which find that Civil Code section 1708.8 is inapplicable in these proceedings, and order the parties to meet and confer to prepare a neutral cover letter to QME Dr. Georgis, and order the submission of the sub rosa films to the QME for review pursuant to Labor Code section 4062.3(a)(2).

For the foregoing reasons,

IT IS ORDERED as our **DECISION AFTER RECONSIDERATION** that the May 21, 2021 Findings and Orders are **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Juan Licea, while employed as a machine operator at Los Angeles, California, by Screwmatic, claims to have sustained injury arising out of and in the course of employment on August 10, 2016.
2. Civil Code section 1708.8 is inapplicable to these proceedings.
3. Pursuant to Labor Code section 4062.3(a)(2), the sub rosa films taken by David Lopez between November 2, 2020 and November 5, 2020 are nonmedical records relevant to the determination of a medical issue.

ORDER

a. Exhibits B and C are admitted into evidence.
b. Exhibit A shall not be provided to QME Dr. Georgis.
c. The parties shall meet and confer and prepare a neutral cover letter to QME Dr. Georgis, with jurisdiction reserved to the WCJ in the event of a dispute.
d. The sub rosa films taken by David Lopez between November 2, 2020 and November 5, 2020 shall be provided to QME Dr. Georgis pursuant to Labor Code section 4062.3(a)(2).

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 28, 2022

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

JUAN LICEA
LAW OFFICES OF JIE CI DING, INC.
TOBIN LUCKS

SAR/abs

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