WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WILLIAM AREY, *Applicant*

vs.

**MAGIC MOUNTAIN, LLC;
HARTFORD ACCIDENT AND INDEMNITY COMPANY, administered by
BROADSPIRE, *Defendants***

**Adjudication Number: ADJ10266237
Van Nuys District Office**

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION, AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration and removal from the December 29, 2022 Findings of Fact and Order (F&O), wherein the Workers' Compensation Administrative Law Judge (WCJ) determined there was no ex parte communication between applicant and the Agreed Medical Evaluator (AME), and further denied defendant's motion to strike the AME reporting.

Defendant contends the WCJ incorrectly analyzed what constitutes impermissible ex parte communication, as defined and proscribed by Labor Code section 4062.3.[1] Defendant avers that the panel decision of the Workers' Compensation Appeals Board (WCAB) in *Belling v. United Parcel Service, Inc.* (December 21, 2015, ADJ944426 (VNO 0538295) [2015 Cal. Wrk. Comp. P.D. LEXIS 738] is factually distinguishable from the present matter, and that the propriety of communication between applicant's sister and the medical-legal evaluator has previously been litigated and resolved in favor of defendant.

We have received an Answer from applicant. The WCJ has filed a Report and Recommendation on Petition for Reconsideration and Removal (Report), recommending we deny the Petition.

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

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, and correct the clerical error contained in Stipulated Fact No.2, as recommended by the WCJ. We will otherwise affirm the December 29, 2022 Findings of Fact and Order.

FACTUAL BACKGROUND

Applicant claimed injury to the brain, head, nervous system, circulatory system, psyche and unclassified "other" body parts/systems while employed as a ride mechanic by defendant Six Flags Magic Mountain, LLC, on September 10, 2015.

The parties selected Jeffrey Caren, M.D., to act as the Qualified Medical Evaluator in internal medicine/cardiology, and on November 10, 2017, Dr. Caren issued an initial report.

On December 28, 2018, defendant filed a Motion to Strike Dr. Caren as the Panel QME, averring applicant's sister accompanied applicant to the evaluation with Dr. Caren, and provided a medical history and other information on applicant's case to the QME. (Motion to Strike Dr. Caren as the Panel QME, dated December 28, 2018, at 4:3.)

On February 12, 2019, the parties appeared at Priority Conference, and the WCJ issued an order determining there to be good cause to strike the existing panel on the grounds that there was "a dispute" as to whether applicant's sister can attend the QME evaluation and provide information. The WCJ ordered the reporting of Dr. Caren of November 10, 2017 stricken and inadmissible, and ordered the issuance of a replacement panel. (Minutes of Hearing, dated February 12, 2019.)

The parties subsequently reached an accord to utilize Roger Bertoldi, M.D. as an Agreed Medical Evaluator (AME) in neurology. AME Dr. Bertoldi evaluated applicant and issued a report dated January 20, 2020.

On June 7, 2022, defendant filed a Motion to Strike Dr. Bertoldi as the "Panel AME," averring that applicant's sister had accompanied applicant to the evaluation with Dr. Beroldi, and had provided medical history and an account of applicant's symptoms to the AME. (Motion to Strike Dr. Bertoldi as the Panel AME, dated June 7, 2022.)

On September 8, 2022, the parties proceeded to trial on the sole issue of "Defendant's motion to strike Dr. Bertoldi." (Minutes of Hearing, dated September 8, 2022, at 2:16.) The parties submitted the matter for decision without witness testimony.

On December 29, 2022, the WCJ issued his F&O, determining in relevant part that "there was no ex-parte communication as contemplated under California Labor Code §4062.3(g)." (F&O, Findings of Fact No. 1.) The WCJ denied defendant's June 7, 2022 Motion to Strike AME Dr. Bertoldi, accordingly. (F&O, Order No. 1.)

Defendant's Petition contends the F&O erroneously refers to the employer's insurance carrier as the employer. (Petition, at 4:19.) The petition avers that the parties jointly agreed and requested that the AME avoid asking or relying on information provided by applicant's sister, and that the terms of the agreement were violated when the AME relied on the information tendered by applicant's sister at the evaluation. (*Id*. at 6:13.) Defendant avers the WCJ erred in relying on the reasoning set forth in the WCAB panel decision in *Belling v. United Parcel Service, Inc.*, *supra*, 2015 Cal. Wrk. Comp. P.D. LEXIS 738. The Petition explains that in *Belling*, the non-verbal applicant required the attendance and assistance of his wife at a medical-legal evaluation, and that without the assistance of his spouse, applicant would effectively be deprived of the opportunity to be evaluated by a PQME. (Petition, at 7:16.) Here, however, applicant is able to effectively communicate, as evidenced by his successful completion of a deposition two years after his injury. Defendant also avers that a 2019 determination in which a WCJ found that applicant's sister's attendance at a prior PQME evaluation constituted impermissible ex parte communication, is binding in the present dispute under the doctrine of collateral estoppel. (*Id*. at 8:19.) Defendant requests we grant Reconsideration or Removal, issue an order striking Dr. Bertoldi as the AME, and return the matter to the trial level to correct the clerical error as to the identity of applicant's employer.

Applicant's answer first objects to the defendant's attachment of, and reference to, the parties' joint AME letter that was not admitted into evidence. (Answer, at 4:2.) Applicant avers that because there is no evidence of the parties' agreement as to what information was to be provided the AME, the WCJ appropriately determined that defendant had not established a substantive violation of that agreement. (Answer, at 6:9.) Applicant asserts that the WCJ's decision in consistent with applicable case law, and that the affirmative defense of collateral estoppel was waived for failure to timely raise the issue at trial. (Answer, at 8:14.)

The WCJ's Report observes that defendant's Petition contains exhibits attached in violation of WCAB Rule 10945(c)(2), which prohibits the attachment of documents that are not part of the adjudication file unless a party is seeking reconsideration based on newly discovered evidence. (Cal. Code Regs., tit. 8, § 10945(c)(2).) The report notes that defendant has not offered admissible evidence as to the nature of the agreement between the parties regarding what information was to be provided to the AME, and that insofar as the Petition seeks removal of the matter to the WCAB, petitioner has not established irreparable harm. (Report, at p. 7.) The Report also observes that the doctrine of collateral estoppel requires that a prior issue be "actually litigated," and "decided on the merits," and that here, the issue of applicant's sister's participation in the medical-legal examination process was previously neither actually litigated nor decided on the merits. (Petition, at p. 8.) Accordingly, the WCJ recommends we deny the petition.

DISCUSSION

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "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 the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board 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. (*Shipley, supra*, 7 Cal.App.4th 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.)

In this case, the WCJ issued the F&O on December 29, 2022 and defendant filed a timely petition on January 18, 2023. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely petition and that the Appeals Board's failure to act on that petition was in error, we find that our time to act on defendant's petition was tolled.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either

"determines any substantive right or liability of those involved in the case" *(Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar 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 employment. This is a final order subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].) Defendant seeks amendment to this finding. (Petition, at 4:21.) We will treat the petition as seeking reconsideration, accordingly.

Defendant avers applicant engaged in ex parte contact with the AME because applicant's sister provided information including applicant's symptoms and medical history at the medical-legal evaluation of AME Dr. Bertoldi. Defendant asserts that our panel decision in *Belling v. United Parcel Service, supra*, 2015 Cal. Wrk. Comp. P.D. LEXIS 738, is instructive insofar as it limits the circumstances under which a family member or other person may attend and substantively participate in a medical-legal evaluation.

In *Belling*, applicant suffered a significant cerebrovascular accident that left him with severe neurocognitive deficits. Applicant's spouse accompanied him to his medical-legal

evaluations, and provided the evaluators with a history of the injury, as well as her husband's current complaints. (*Belling, supra*, at 11.) We held that such conduct was reasonable and necessary, because to prohibit such assistance would effectively deprive applicant of the PQME dispute resolution process. (*Id*. at p. 13.)

Defendant avers that the applicant in *Belling* had profound limitations in his ability to communicate, and that in the absence of similarly profound limitations, applicant in the present matter has not established the necessity of having a family member attend and participate in the AME evaluation with Dr. Bertoldi. (Petition, at 7:16.) However, in *Belling* we likened applicant's spouse's conveyance of his symptoms and medical history to the assistance provided by a language interpreter:

> Since applicant is unable to talk or otherwise communicate, he would be deprived of the opportunity of a PQME without the assistance of someone to transmit the required information (history of injury, complaints, medical history) on his behalf. The assistance applicant's wife provided in this case is akin to the assistance provided by a language interpreter on behalf of a non-English speaking injured employee during such an evaluation. Interpretive services clearly come within the exception set forth in subsection (i) of section 4062.3 in that they are merely transmissions of information on the injured employee's behalf and, thus, communications by the employee. Any other conclusion is contrary to Civil Code section 3531. Further, our conclusion is consistent with the Court of Appeal's acknowledgement that section 4062.3(g)'s prohibition of ex-parte communications between a party and the PQME should not be interpreted or applied "… in a manner that will lead to absurd results." (*Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 590 [114 Cal. Rptr. 3d 429, 75 Cal.Comp.Cases 817].) (*Belling, supra*, at 14.)

Our decision in *Belling* thus acknowledged that the ability to transmit necessary medical information to a medical-legal evaluator, including symptoms and medical history, is an essential component to a medical-legal examination. (See also Labor Code § 4628(a)(1); Cal Code Regs., tit. 8, § 10682(a)(2)-(5); *West v. Industrial Acci. Com.* (1947) 79 Cal.App.2d 711 [12 Cal.Comp.Cases 86].) We concluded that a family member conveying this type of essential information at a QME evaluation under circumstances that would otherwise limit or even prevent the transmission of such information, was properly understood to be the transmission of information *on behalf of the employee*. As such, the conveyance of this information would be considered communication *by the employee*, and would not constitute either *ex parte* or otherwise prohibited communication under section 4062.3.

Our subsequent decision in *Trujillo v. TIC - The Industrial Company* (March 11, 2019, ADJ8531754) [2019 Cal. Wrk. Comp. P.D. LEXIS 90] involved an applicant who sustained a traumatic brain injury, and whose wife accompanied him to the AME evaluation and offered information relating to his condition, symptoms and medical history. We held that:

> If an injured employee has memory issues, the employee may be unable to provide the medical-legal evaluator with an accurate and adequate history during the examination. In the absence of an accurate and adequate history, the resulting medical-legal report may not be substantial evidence. Medical-legal evaluators are entrusted to utilize their judgment, experience, training and skill in evaluating an employee. (See e.g., *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808 [115 Cal. Rptr. 3d 112, 75 Cal.Comp.Cases 837]; see also *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist. (Almaraz-Guzman II*) (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc).) Medical-legal evaluators may be trusted to exercise that judgment to identify and interview collateral sources only when necessary to obtain an accurate and adequate history as part of the employee's examination. (*Trujillo, supra*, at 20**.**)

Here, the AME has testified that applicant's ability to recall his medical history was significantly compromised, and that the assistance of applicant's sister was "essential" to the medical-legal evaluation. (Ex. B, Transcript of the Deposition of Roger V. Bertoldi, M.D., dated November 19, 2021, at 56:3.) Moreover, the AME was aware of the participation of applicant's sister in the preparation of the medical history and applicant's symptoms and complaints, and exercised his judgement to determine that her assistance was timely and necessary. (*Ibid.*) Pursuant to the reasoning in *Belling, supra*, and *Trujillo, supra*, we are persuaded that the participation of applicant's sister in the evaluation by AME Dr. Bertoldi was both necessary and permissible under the circumstances, as the failure to obtain an appropriate medical history would have invalidated any resulting reporting from the AME, and because applicant's sister was communicating on applicant's behalf during the course of the medical-legal evaluation. (Lab. Code § 4628; *Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].) To prohibit applicant from effectively conveying his symptoms or medical history as part of the medical-legal evaluation process would risk the "absurd results" the California Court of Appeal has cautioned against. (*Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 590 [114 Cal. Rptr. 3d 429, 75 Cal.Comp.Cases 817].)

Defendant also contends that the parties agreed to instruct the AME not to consider any information gleaned from applicant's sister, and that the AME's reliance on any such information was a violation of that agreement. (Petition, at 6:13.) However, as is noted by the WCJ, the defendant has not met the burden proving a violation of this agreement because the underlying agreement was neither offered nor received in evidence. (Report, at pp. 5, 7.)

Defendant also contends the issue of whether the interaction between applicant's sister and the AME constitutes ex parte communication has previously been decided adversely to applicant, and should now be "resolved in favor of Defendants under the doctrine of collateral estoppel." (Petition, at 9:1.)

The California Supreme Court has summarized the requirements necessary to an assertion of collateral estoppel as follows:

> Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223].) The doctrine applies only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921, 943, 38 Cal. Rptr. 3d 220, 126 P.3d 1040.)

Here, the Report observes that the February 12, 2019 order striking the panel was the result of an off-the-record discussion between the prior WCJ and the parties, and that the issue was not "actually decided" following a trial and opening of the evidentiary record, and as a result, it cannot be established that the order to strike the reporting of the prior AME was "decided on merits." (*Pacific Lumber, Co., supra*, 37 Cal.4th 921, 943.) We agree with the WCJ's analysis, and conclude that defendant has not met the evidentiary burden necessary to sustain a claim for relief under the doctrine of collateral estoppel.

We find it necessary to admonish attorney Rudie Baldwin of Amaro Baldwin, LLP, for failure to comply with our Rules. (Cal. Code Regs., tit. 8, § 10421(b)(4).) WCAB Rule 10945(b) requires that every petition for reconsideration, removal or disqualification be supported by

specific reference *to the record*. (Cal. Code Regs., tit. 8, § 10945(b), emphasis added). Additionally, Rule 10945(c) prohibits the attachment of documents to a petition for removal, reconsideration, or disqualification, which are not part of the adjudication file. Here, defendant's attachment of, and citation to, documents that are not a part of the evidentiary record violates Rule 10945. We remind the parties that full compliance with our Rules is expected, and that future violations may result in the imposition of sanctions.

We further note defendant's contention that "Stipulated Facts" No. 2 erroneously refers to the employer as Hartford Accident and Indemnity Company. (Petition at 4:21.) The WCJ's Report observes that the words, "insured by" were inadvertently omitted from the decision. We will grant reconsideration for the sole purpose of correcting clerical error in Stipulated Fact No. 2, to reflect that the employer, Six Flags Magic Mountain, LLC, was insured by the Hartford Accident and Indemnity Company, administered by Broadspire.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact and Order, dated December 29, 2022, is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Worker's Compensation Appeals Board, that the Findings of Fact and Order, dated December 29, 2022 is **AFFIRMED**, except that it is **AMENDED** as follows:

STIPULATED FACTS

2. At the time of injury the employer was insured by Hartford Accident and Indemnity Company, administered by Broadspire.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2023

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

WILLIAM AREY
TINA ODJAGHIAN LAW GROUP
AMARO BALDWIN

SAR/abs

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