WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHN KILPATRICK, *Applicant*

vs.

CITY OF CHULA VISTA, permissibly self-insured, administered by TRISTAR RISK MANAGEMENT, *Defendants*

Adjudication Numbers: ADJ8349114, ADJ8349116, ADJ8349118
San Diego District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL

We have considered the allegations of applicant's Petition for Reconsideration/Removal, defendant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto.[1] Based on our review of the record and the analysis of applicant's arguments in the WCJ's Report, as well as for the reasons discussed below, we will dismiss the Petition to the extent it seeks reconsideration and deny it to the extent it seeks removal.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.)[2] 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,

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

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.

Here, the WCJ's September 1, 2022 Findings, Award and Order (Order) solely resolves an intermediate procedural issue that defendant is entitled to a replacement qualified medical evaluator (QME) due to applicant's violation of section 4062.3. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and the Petition will be dismissed to the extent it seeks reconsideration.

We will also deny the Petition to the extent it seeks removal. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*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].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Section 4062.3 provides as follows in relevant part:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
>
> > (1) Records prepared or maintained by the employee's treating physician or physicians.
> >
> > (2) Medical and nonmedical records relevant to determination of the medical issue.
>
> (b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.
>
> …
>
> (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.

(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.

(Lab. Code, § 4062.3(a)-(b) and (e)-(f).)

The WCJ found that applicant violated section 4062.3 by his February 8, 2022 letter to the QME. Applicant's February 8, 2022 letter to the QME was simultaneously served on defendant. (Applicant's Exhibit No. 1, Applicant Attorney's letter to PQME Alexis Link, M.D., February 8, 2022, p. 5.) The letter was thus not an ex parte communication as that term was defined in *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, 142 (Appeals Board en banc) and did not violate section 4062.3(e).

However, applicant may still have violated section 4062.3(b) by serving information on the QME without serving defendant with his letter 20 days in advance. "Section 4062.3 contains different procedural requirements depending on the nature of the documents or materials to be provided to the QME." (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1810 (Appeals Board en banc).) Due to the differing treatment of information versus communication in the statute, the Appeals Board in *Maxham* delineated between the two as subsequently explained in *Suon*:

The preliminary question is whether the documents or materials sent to the QME are "information" or "communication" as those terms are used in the Labor Code.

In *Maxham*, the Appeals Board distinguished between "information" and "communication" under section 4062.3 as follows:

'Information,' as that term is used in section 4062.3, constitutes (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.

A 'communication,' as that term is used in section 4062.3, can constitute 'information' if it contains, references, or encloses (1) records prepared or

> maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues. (*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 138.)
>
> (*Suon, supra*, 83 Cal.Comp.Cases at p. 1810.)

Applicant's letter to the QME discusses both medical and nonmedical records relevant to determination of the medical issues including medical reporting, tape recordings and employment records. Consequently, applicant's letter was subject to section 4062.3(b).

In *Suon*, the Appeals Board opined that "[i]n contrast to the specific remedy provided by section 4062.3(g) for an ex parte communication, the Labor Code does not provide a specific remedy for a violation of section 4062.3(b)." (*Suon*, *supra*, 83 Cal.Comp.Cases at p. 1815.) The decision held that the trier of fact has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b). (*Id.*) Six potential factors were outlined for the trier of fact to consider (as relevant to the particular facts of the case) in determining the appropriate remedy for a violation of section 4062.3(b):

> 1. The prejudicial impact versus the probative weight of the information.
>
> 2. The reasonableness, authenticity and, as appropriate, relevance of the information to determination of the medical issues.
>
> 3. The timeline of events including: evidence of proper service of the information on the opposing party, attempts, if any, by the offending party to cure the violation, any disputes regarding receipt by the opposing party and when the opposing party objected to the violation.
>
> 4. Case specific factual reasons that justify replacing or keeping the current QME, including the length of time the QME has been on the case.
>
> 5. Whether there were good faith efforts by the parties to agree on the information to be provided to the QME.
>
> 6. The constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)
>
> (*Id.* at pp. 1815-1816.)

The en banc decision expressly recognized that the trier of fact "may conclude that the appropriate remedy is a new QME." (*Id.* at p. 1816.)

The WCJ evaluated applicant's letter to the QME and its discussion of disputed facts.

Applicant's letter contained the following statements:

> I also asked you to keep in mind that applicant's due process was violated when they secretly tape recorded him without his permission. In all of the complaints that the defendant has served upon you, none of those complaints are serious and egregious as the defendant's illegal tape recording of the applicant. It appears that the complaints are nothing more than a pattern of harassment by the City of Chula Vista against the applicant.
>
> I also note that one of the complaints of June 18, 2004 is on one of the days in which the applicant had an admitted industrial injury.
>
> Please note from the records the following:
>
> 1) August 5, 2004 - Notice of Intended Termination
> 2) September 2, 2004 - Agreement in Lieu of Termination
> 3) February 1, 2005 - Termination
>
> Labor Code §3600(10)(D) indicates:
>
> > The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this paragraph inapplicable to the employee.
>
> In the complaint dated January 11, 2005 it was noted that there was no police report attached to review and there was no interview of the applicant to get his side of the story.
>
> In your final analysis, please consider whether or not these complaints constitute patterns of harassment by the City of Chula Vista against Mr. Kilpatrick.
>
> (Applicant's Exhibit No. 1, Applicant Attorney's letter to PQME Alexis Link, M.D., February 8, 2022, pp. 1-2.)

The WCJ found that the misleading and inflammatory language in applicant's letter warranted a replacement QME panel. As discussed by the WCJ in his Report:

> A party's advocacy letter may alert the QME to facts and issues that a party is alleging, and may refer the QME to appropriate portions of the record that support their position. However, a party may not mislead, misstate, or invent facts that are favorable to their position. Likewise, a party should not present their version of the facts as undisputed conclusions of fact or law, as it will mislead the QME, and result in a report that is not substantial evidence.
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> (Report, September 15, 2022, p. 7.)

Under the circumstances here, we discern no basis to disturb the discretion exercised by the WCJ

to provide for a new psychiatric QME panel for applicant's violation of section 4062.3(b). We are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to applicant.

Therefore, we will dismiss applicant's Petition as one seeking reconsideration and deny his Petition as one seeking removal.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings, Award and Order issued by the WCJ on September 1, 2022 is **DISMISSED** and the Petition for Removal is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 14, 2022

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

JOHN KILPATRICK
LAW OFFICE OF DENNIS HERSHEWE
LAW OFFICES OF ENGLAND, PONTICELLO & ST. CLAIR

AI/*pc*

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