WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICK WANYONYI, *Applicant*

vs.

COUNTY OF LOS ANGELES / GENERAL HOSPITAL, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12181367
Marina Del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the Findings of Fact and Order ("F&O") issued on November 4, 2024, wherein the workers' compensation administrative law judge ("WCJ") ordered that the *sub rosa* surveillance video at issue in this matter was admissible at trial, and could be sent to the Agreed Medical Examiner ("AME") if applicant did not object within 25 days in the event that there was "genuine doubt" as to the video's authenticity. Applicant objects that the video should have been excluded from evidence entirely based upon defendant's failure to submit evidence properly authenticating it.

We received an Answer from defendant. We also received a Supplemental Petition from applicant, which we will accept pursuant to WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964). Finally, we received a Report and Recommendation on Petition for Removal from the WCJ, recommending that removal be denied.

We have reviewed the Petition, the Answer, the Supplemental Petition and the Report, as well as the record. For the reasons discussed below, we will grant the Petition as a petition for reconsideration, and amend the F&O to make clear that (1) defendant's Exhibit B is not admissible and (2) applicant is not precluded from deposing the investigators who prepared the *sub rosa* surveillance footage.

FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a specific injury to multiple body parts sustained on November 23, 2018 while employed by defendant as a registered nurse.

In May of 2024, defendant served applicant with *sub rosa* surveillance video, and notified applicant that it intended to submit the video to the AMEs in the case. Applicant objected, requesting investigator and witness logs pertaining to the *sub rosa* surveillance videos, which defendant did not provide.

The matter was initially set for trial on September 17, 2024, but was continued to allow the parties to provide briefs on whether "applicability of CCP 1987 regarding subpoenas and failure to serve investigative report and logs prevents the video from being utilized in evidence." (Minutes of Hearing, 9/17/24, at p .1.)

The matter proceeded to trial on October 22, 2024. The parties stipulated to the fact of injury, and to insurance coverage. (Minutes of Hearing / Summary of Evidence ("MOH/SOE"), 10/22/2024, at p. 2.) The sole issue for trial not deferred was listed as: "Exclusion of suba rosa from evidentiary record." (*Ibid.*) Exhibits were introduced and admitted, except for Defendant's Exhibit B, which contained the investigator and witness logs it had previously failed to serve on applicant; the WCJ marked this exhibit for identification only, with admissibility to be later determined. (*Id.* at pp. 2–3.) The matter was submitted for decision without testimony, along with the previously solicited briefs from both parties. (*Id.* at p. 1.)

On November 4, 2024, the WCJ issued the F&O, finding that "Any investigator involved with obtaining the disputed sub rosa video is hereby excluded from testifying in this matter[,]" but that the video itself "is admissible for all purposes." (F&O, at p. 2, ¶¶ 2–3.) The F&O further orders as follows:

> The sub rosa video is hereby Ordered to be sent to the Agreed Medical Examiner after 25 days of the issuance of this Order. Applicant's counsel will have this time in order to review the video and file an objection in the event that there is a genuine doubt regarding whether the sub rosa video depicts what Defendant purports it to depict (i.e. whether the subject was actually the applicant; whether the videos were shot on the dates they were purported to be shot on). In the event such an objection is filed with the WCAB, a hearing will be set to address the issue.

(F&O, at p. 2.) The appended Opinion on Decision explains that although the WCJ agreed with applicant that defendant's failure to provide investigator and witness logs for the investigators involved in the *sub rosa* filming should preclude those investigators from testifying, the WCJ disagreed that the video itself should be excluded in the absence of any genuine dispute as to what the video depicts. (Opinion on Decision, at p .1.)

This Petition for Removal followed.

DISCUSSION

I.

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 parties' stipulations included threshold issues such as employment and AOE/COE. Accordingly, the F&O is a final decision subject to reconsideration rather than removal, and we will consider the Petition as a petition for reconsideration. However, we will still apply the removal standard, because applicant seeks review only of an interlocutory issue, namely the admissibility of the *sub rosa* surveillance video.

II.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 18, 2024 and 60 days from the date of transmission is January 17, 2025. This decision is issued by or on January 17, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 18, 2024 and the case was transmitted to the Appeals Board on November 18, 2024. Service of the Report and

transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 18, 2024.

III.

Removal – the legal standard governing the claim raised here, as described above in Section I – is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 3 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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 significant 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).)

Labor Code section 4062.3 (a) states in relevant part: "Any party may provide . . . medical and nonmedical records relevant to determination of the medical issue." (Lab. Code, § 4062.3(a)(2).) Subdivision (b) of the same section states in relevant part: "Information that a party proposes to provide . . . 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." (Lab. Code, § 4062.3(b).)

California Code of Regulations, title 8, section 35, subdivision (a) allows for the provision to the AME of "non-medical records, including films and video-tapes, which are relevant to the determination of medical issue(s) in dispute, after compliance with subdivision 35(c)." (Cal. Code Regs., tit. 8, § 35(a)(5).) Subdivision (c) of the same regulation, meanwhile, provides that the party seeking to provide such non-medical records shall serve the evidence on the opposing party at least 20 days prior to providing it to the evaluator. (Cal. Code Regs., tit. 8, § 35(c).) Subdivision (d) allows the opposing party 10 days to object to the provision of the records, in which case the

records shall not be provided unless so ordered by a WCJ. (Cal. Code Regs., tit. 8, § 35(d). Finally, subdivision (f) states: "Either party may use discovery to establish the accuracy or authenticity of non-medical records or information prior to the evaluation." (Cal. Code Regs., tit. 8, § 35(f).)

Initially, we note that the Report admits error with regard to the failure to issue a ruling on the admissibility of defendant's Exhibit B, which contained the investigator and witness logs that defendant failed to previously provide to applicant. The Report notes that this exhibit should have been found inadmissible, and we concur with the WCJ's conclusion. We will therefore amend the F&O to reflect this finding.

Moving on to the merits of the dispute, the Supplemental Petition clarifies that the remedy applicant ultimately seeks from this Petition for Removal is a finding that the *sub rosa* surveillance videos in question are inadmissible and cannot be sent to the AMEs in the case, based upon defendant's alleged failure to properly turn over investigator and witness logs of the investigators who took the videos.

Here, we agree with the WCJ that nothing in the governing statues or regulations appears to *per se* require defendant to provide investigative and witness logs that correspond to *sub rosa* surveillance it intends to forward to the AME along with the surveillance videos themselves. Nor do any of the cases cited in the Petition directly involve the statutory and regulatory provisions at issue here. Accordingly, the failure to serve those logs on applicant does not compel a finding that the *sub rosa* surveillance must be suppressed.

Of course, this does not mean that the investigative and witness logs might not be relevant to a subsequent objection pursuant to subdivision (d) on the grounds that the video is not authentic or relevant, and therefore the provision of such logs, upon request, might be proper under subdivision (f) as part of discovery to establish the accuracy or authenticity of the medical records. Nor does this judgement call into question the WCJ's conclusion that defendant's failure to timely provide these logs to applicant upon request renders the logs inadmissible as independent evidence.

Here, however, there appears to be no such genuine dispute – or, at least, no such genuine dispute has clearly been alleged. Applicant's arguments thus far appear limited to the contention that defendant's failure to comply with its discovery obligations require the video to be suppressed. This, however, puts the cart before the horse – in the absence of any genuine dispute as to the video's relevance, we think it would be premature to suppress the video based on defendant's alleged failure to respond to an objection that has not yet clearly been asserted. Review of

applicant's original objection to the provision of the surveillance video indicates that objection was not based upon relevance and/or authenticity – instead, the objection was made based on "Defendants' violation of law and willful suppression of evidence." (See Applicant's Ex. 2, at p. 1.)

To this end, we note that the F&O provides a 25-day timeline for applicant to make such an objection based on a genuine dispute as to the authenticity and/or relevance of the videos.[1] Because we are amending the F&O, this period will be reset, and applicant may therefore still act upon the WCJ's invitation to file such an objection, if one can be made in good faith.

In light of that possibility, we consider applicant's argument that defendant's failure to provide the names and addresses of the investigators deprives it of the ability to conduct discovery as to the authenticity of the video, such as by taking depositions of the investigators. (See Petition, at p. 5.) Although we see no reason that service of subpoenas must be at the home addresses of the investigators rather than their work addresses, we take applicant's point to the extent that the F&O's prohibition on the taking of testimony from the investigators could be construed to prevent the taking of their depositions as well. We will therefore amend the F&O to make clear that it does not prevent the taking of the investigators' depositions, should applicant elect to proceed down that route.

Accordingly, we will grant the Petition and amend the F&O to find Defendant's Exhibit B inadmissible and to clarify that Finding of Fact 2 does not preclude the deposition of the investigators.

[1] It is not entirely clear why the WCJ chose to provide applicant with another 25-day period in which to contest the authenticity of the video, rather than simply resolving the issue in the F&O once and for all. However, given that defendant did not raise this issue in its Answer, we see no compelling basis to disturb the F&O on this point.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the November 4, 2024 Findings of Fact and Order is **GRANTED** as a Petition for Reconsideration.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 4, 2024 Findings of Fact and Order is **AMENDED** as follows:

FINDINGS OF FACT

2. Any investigator involved with obtaining the disputed sub rosa video is hereby excluded from testifying in this matter. This finding shall not preclude applicant from taking the depositions of the investigators.

6. Defendant's Exhibit B is inadmissible.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT (see separate opinion)
/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 15, 2025

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

PATRICK WANYONYI
BERKOWITZ & COHEN
ZGRABLICH & MONTGOMERY

AW/*pm*

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

DISSENTING OPINION OF COMMISSIONER SNELLINGS

I respectfully dissent. Although I agree with my colleagues as to the legal conclusions reached in the majority opinion, I do not think applicant's attorney should be provided another opportunity to make an argument that he has repeatedly failed to make – namely, that the *sub rosa* surveillance video in question is inauthentic or otherwise irrelevant to the medical dispute in this case. Applicant's attorney appears to have made a tactical choice to argue non-compliance with the governing statutes and regulations rather than to assert any genuine objection to the authenticity or relevance of the surveillance video, both in his initial correspondence with defendant and before the WCJ. Having failed to prevail on this point, applicant should not, in my view, be afforded yet another bite at the apple.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 15, 2025

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

PATRICK WANYONYI
BERKOWITZ & COHEN
ZGRABLICH & MONTGOMERY

AW/pm

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