WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANDAB SUON, ***Applicant,*** **vs.** **CALIFORNIA DAIRIES; INSURANCE COMPANY OF THE WEST; THE HARTFORD; STARR INDEMNITY AND LIABILITY INSURANCE COMPANY,** ***Defendants.***	**Case Nos. ADJ9013590** **ADJ9014316** **ADJ9489408** **(Fresno District Office)** **OPINION AND ORDERS VACATING ORDER GRANTING RECONSIDERATION, DISMISSING PETITION FOR RECONSIDERATION, GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL** **(En Banc)**

Reconsideration was granted on June 1, 2018 in order to further study the factual and legal issues in this case. Reconsideration was only granted with respect to ADJ9489408. This Opinion includes all three of applicant's claims since they were previously consolidated.[1]

To secure uniformity of decision in the future, the Chair of the Appeals Board, upon a unanimous vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[2] (Lab. Code, § 115.)[3]

On March 8, 2018, a workers' compensation administrative law judge (WCJ) issued a Findings of Fact, Order and Opinion on Decision (Findings), which found, in relevant part, that defendant, The Hartford, provided medical information to the internal medicine panel qualified medical evaluator (QME) without first serving applicant and engaged in ex parte communication with the QME in violation of Labor

[1] The Hartford is the named defendant in ADJ9013590. The Hartford and Starr Indemnity and Liability Insurance Company are co-defendants in ADJ9014316. Insurance Company of the West (ICW) and The Hartford are co-defendants in ADJ9489408.

[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) This en banc decision is also adopted as a precedent decision pursuant to Government Code section 11425.60(b).

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

Code sections 4062.3(b) and 4062.3(e). (Lab. Code, § 4062.3(b) & (e).) The WCJ ordered the parties to obtain a new QME panel in internal medicine or agree to an internal medicine agreed medical evaluator (AME).

In response to the Findings, defendant, ICW, sought reconsideration, and in the alternative, removal of the case to the Appeals Board. ICW contends that the issue of ex parte communication with the QME was not one of the issues identified at trial and The Hartford's correspondence to the QME was not an "ex parte" communication as described in section 4062.3. ICW also contends that The Hartford's correspondence to the QME was not "information" as described in section 4062.3 and ICW should not be penalized for a co-defendant's conduct.

We received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

Based upon our review of the record, ICW's Petition, applicant's answer, the contents of the WCJ's Report, and the relevant statutes and case law, we hold as follows:

1. **Disputes over what information to provide to the QME are to be presented to the WCAB if the parties cannot informally resolve the dispute.**
2. **Although section 4062.3(b) does not give a specific timeline for the opposing party to object to the QME's consideration of medical records, the opposing party must object to the provision of medical records to the QME within a reasonable time in order to preserve the objection.**
3. **If the aggrieved party elects to terminate the evaluation and seek a new evaluation due to an ex parte communication, the aggrieved party must do so within a reasonable time following discovery of the prohibited communication.**
4. **The trier of fact has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b).**
5. **Removal is the appropriate procedural avenue to challenge a decision regarding disputes over what information to provide to the QME and ex parte communication with the QME.**

For the reasons discussed below, we will grant ICW's Petition as one for removal, rescind the Findings and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant has filed three claims for injury while employed as a machine operator by California Dairies to the following body parts with their respective dates of injury (as pled): the right shoulder, stress, sleep, legs, and feet on February 28, 2012 (ADJ9013590); the right shoulder, neck, head, sleep, psyche, heart, legs and feet through June 27, 2013 (ADJ9014316); and the circulatory system and heart through January 5, 2010 (ADJ9489408).

On March 11, 2015, an Order for Additional QME Panels in internal medicine/cardiovascular and psychiatry was issued. The Order stated all three case numbers.

Applicant's three cases were ordered consolidated and ADJ9014316 was designated the master file at a status conference on May 13, 2015. ICW was also joined as a party defendant to ADJ9489408 at the conference over its objection. ICW has denied this claim for purported lack of coverage for the employer at the time of injury. (Defendant's Exhibit F, Notice of Denial of Claim, April 7, 2015, p. 1; Defendant's Exhibit G, Notice of Denial of Claim, April 2, 2015, p. 1.)

Robert Weber, M.D., acted as the internal medicine panel QME and evaluated applicant on August 3, 2015. (Applicant's Exhibit No. 1, QME Report of Robert Weber, M.D., August 3, 2015, p. 1.) In his report, Dr. Weber opined as follows regarding causation:

> Given his well-documented, multiple, major risk factors for coronary heart disease and absent any history that Mr. Suon provided with respect to potential contributing factors of a work-related nature, such as having experienced frequent and chronic emotional stress, it is my opinion based upon reasonable medical probability that causation of Mr. Suon's coronary artery disease and small myocardial infarction of September 2009 was nonindustrial.

(*Id.* at p. 48.)

Applicant cross-examined Dr. Weber on February 10, 2016. (Applicant's Exhibit No. 3, Deposition Transcript of Robert Weber, M.D., February 10, 2016.) During his testimony, Dr. Weber consented to

review a psychiatric QME report regarding stressful activities or events at work. (*Id.* at pp. 16:10-16, 17:5-17, 35:1-12.)

Robindra Paul, M.D., was the psychiatric panel QME in ADJ9013590 and evaluated applicant on January 26, 2016 and February 24, 2016, with his report issuing on March 16, 2016. (Defendant's Exhibit N, Report of Robindra Paul, M.D., March 16, 2016, p. 2.)

On April 19, 2016, Mr. Jeremiah Paul,[4] representing The Hartford, sent a letter to the internal QME Dr. Weber enclosing a copy of Dr. Paul's March 16, 2016 report. The letter stated, in pertinent part:

> In your recent deposition, you requested the opportunity to review applicant's psych QME reporting in order to finalize your opinion as to causation. Enclosed, please find the March 16, 2016 report of Psychiatric Qualified Medical Examiner Dr. Robindra Paul.
>
> Please review Dr. Paul's report and issue a supplemental report as to how your opinion may have changed, if at all.

(Applicant's Exhibit No. 22, Correspondence to Robert Weber, M.D., April 19, 2016.) The letter lists applicant's attorney, Mr. Bryan Leiser, as one of the copied parties, but only states his name, not his address. (*Id.*) No proof of service of the letter is in evidence.

On April 20, 2016, a priority conference took place at which the WCJ ordered an additional QME panel in psychiatry for ADJ9489408. ICW petitioned for removal of the order for an additional panel on May 13, 2016. In response, the WCJ issued an order vacating the order for an additional panel on May 31, 2016, and indicated that the matter would be set for a status conference.

Dr. Weber issued a report dated August 31, 2016 reflecting his receipt and review of Dr. Paul's March 16, 2016 report. (Applicant's Exhibit No. 2, Report of Robert Weber, M.D., August 31, 2016.) Dr. Weber's opinion remained "as expressed" in his previous report. (*Id.* at p. 3.)

Mr. Leiser sent a letter to Mr. Paul on September 20, 2016, advising that ICW's counsel had informed him of the request for a supplemental report from Dr. Weber regarding Dr. Paul's opinions and contending that he did not have any correspondence from Mr. Paul addressed to Dr. Weber. (Applicant's

[4] There is no known relation between Mr. Paul and Dr. Paul.

Exhibit No. 20, Correspondence to Defense attorney, September 20, 2016, p. 1.) Mr. Leiser subsequently sent a second letter to Mr. Paul on October 4, 2016, confirming receipt of Dr. Weber's August 31, 2016 report and reiterating that he was not provided with a copy of the letter sent by Mr. Paul to Dr. Weber. (Applicant's Exhibit No. 21, Correspondence to Defense attorney, October 4, 2016, p. 1.)

The matter ultimately proceeded to trial on January 4, 2018 on the following issues: the status of Dr. Paul as the psychiatric QME, whether Dr. Terrell is the PQME in ADJ9489408[5] and "[w]hether Dr. Weber as the internal medicine QME has been tainted based upon the provision of Dr. Paul's reporting to him during the period of time that this issue was being disputed is sufficient to entitle the applicant to a new internal medicine panel." (Minutes of Hearing, January 4, 2018, p. 2.)[6]

By the resulting March 8, 2018 Findings, the WCJ found, in relevant part, that the parties are required to utilize the psychiatric QME Dr. Paul to address any disputed issues in ADJ9489408,[7] The Hartford violated section 4062.3(b) by providing the internal QME Dr. Weber with medical information without first informing applicant, and The Hartford had ex parte communication with Dr. Weber. The WCJ ordered the parties to return to Dr. Paul for any new issues related to stress and/or psychiatric injury that may arise in relation to ADJ9489408, obtain a new QME panel in internal medicine or select an AME, and that the reports and deposition transcript of Dr. Weber are not to be provided to the new internal PQME or AME.

DISCUSSION

Labor Code section 4062.3 provides in relevant part, as follows:

> (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.

[5] Howard Terrell, M.D., was the resulting psychiatric QME from panel number 1953316 issued pursuant to the April 20, 2016 Order for an Additional Panel that was rescinded by the WCJ on May 31, 2016. (See Applicant's Exhibits Nos. 10, 12-18.)

[6] The cases initially went to trial on this dispute on January 30, 2017 and a Findings of Fact, Orders and Opinion on Decision issued on May 9, 2017. ICW petitioned for reconsideration, and in the alternative, removal of that decision on June 5, 2017, in response to which the WCJ rescinded the original decision on June 19, 2017. (See Cal. Code Regs., tit. 8, § 10859.)

[7] We do not disturb the WCJ's determination in the Findings that applicant is not entitled to another psychiatric QME panel for ADJ9489408. (See *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc).)

(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.

. . .

(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.

(Lab. Code, § 4062.3(a)-(b), (e) & (g).)

I. The Parties Must Communicate With The QME In Writing And Are Prohibited From Ex Parte Communication With The QME.

A. Written Communication With The QME That Is Properly Served To The Opposing Party Is Not Ex Parte.

In *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136 (Appeals Board en banc), the Appeals Board analyzed what constitutes an ex parte communication.[8] Specifically, it was noted that:

[8] ICW's contention that the issue of ex parte communication was not raised at trial is rejected. One of the issues for trial was framed as follows: "[w]hether Dr. Weber as the internal medicine QME has been tainted based upon the provision of Dr. Paul's reporting to him during the period of time that this issue was being disputed is sufficient to entitle the applicant to a new internal medicine panel." (Minutes of Hearing, January 4, 2018, p. 2.) While the parties are required to frame the specific issues in dispute for trial (see Lab. Code, § 5502(d)(3)), the question of whether there has been a "taint" on Dr. Weber as the internal medicine QME by The Hartford's conduct is broad enough to encompass whether there was an impermissible ex parte communication with the QME. A violation of either section 4062.3(b) or 4062.3(g) may result in an irreparable taint on the

> 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].)

(*Maxham, supra*, 82 Cal.Comp.Cases at p. 142.) In *Maxham*, the Appeals Board found that "[b]ecause defendants' counsel was copied on all communications with the AMEs, those communications cannot be said to be 'ex parte'." (*Id.*)

Whether a party properly served a written communication with the QME to the opposing party is a question of fact the determination of which must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

In this matter, the evidence in the record is unclear whether Mr. Paul's letter to the QME Dr. Weber was properly served and received by Mr. Leiser, and the matter will be returned to the WCJ to further address that issue pursuant to the discussion herein.

II. Under Section 4062.3(b), Information That A Party Proposes To Provide To The QME Must Be Served On The Opposing Party 20 Days Before It Is Provided To The QME.

If a communication was not ex parte, the trier of fact must decide if the documents or materials sent to the QME nonetheless constitute "information" subject to section 4062.3(b). Section 4062.3 contains different procedural requirements depending on the nature of the documents or materials to be provided to the QME. Section 4062.3(b) requires that "information" proposed to be provided to the QME "shall be served on the opposing party 20 days before the information is provided to the evaluator." Section 4062.3(e) separately requires that "communications with a [QME] before a medical evaluation" must be served on the opposing party "20 days in advance of the evaluation." However, section 4062.3(e) further provides that "[a]ny subsequent communication with the medical evaluator…shall be served on the

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medical-legal evaluator depending on the circumstances. (See *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 590 [75 Cal.Comp.Cases 817] ["an ex parte communication may be so insignificant and inconsequential that any resulting repercussion would be unreasonable"].)

opposing party when sent to the medical evaluator." 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:

> 1. '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.
>
> 2. 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.)

In *Maxham*, an applicant's advocacy letters were sent to three AMEs and simultaneously copied on defendant. One of the advocacy letters in dispute discussed another AME's report. The *Maxham* decision acknowledged that "the Code requires the parties' agreement before any 'information' is provided to an AME…In contrast, when a party wishes to send a 'communication' to an AME, it is necessary only to serve the opposing party with that communication." (*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 143, citation omitted.)[9] The decision further stated that the AME's report discussed in applicant's advocacy letter "certainly constitutes a medical record relevant to determination of the medical issue in this case, and is thus 'information.'" (*Id.* at p. 145.) The advocacy letter referencing this report "thus could itself be considered 'information' as well." (*Id.*)

In the instant matter, the communication in the form of Mr. Paul's letter took place after Dr. Weber's examination. For purposes of section 4062.3(e), "evaluation" means the examination. Therefore, the first sentence of section 4062.3(e) is not applicable here. The question of whether the communication was properly served as a subsequent communication remains to be determined per the discussion below.

[9] We acknowledge that communications with a panel QME and AME are treated differently in section 4062.3. (See Lab. Code, § 4062.3(e)-(f).) However, the analysis in *Maxham* regarding "information" and "communication" is equally applicable to panel QMEs. (See *Maxham*, *supra*, 82 Cal.Comp.Cases at p. 143, fn. 8.)

Mr. Paul's April 19, 2016 communication to the QME Dr. Weber may also constitute "information" since it references the psychiatric QME Dr. Paul's March 16, 2016 medical-legal report. However, we need not determine whether the letter standing alone is also information because the enclosed medical-legal report from Dr. Paul is indisputably information as described in section 4062.3.

Dr. Weber undeniably received Dr. Paul's enclosed report since Dr. Weber's responsive August 31, 2016 report discusses its contents. As with the AME's report in *Maxham*, there is no viable interpretation of Dr. Paul's report that does not deem it to be a medical record. This is a medical-legal report prepared by a psychiatric panel QME summarizing his evaluation and opinions regarding applicant's psychiatric state. It is consequently "information" subject to section 4062.3(b).

Pursuant to *Maxham*, "[i]n the event a piece of correspondence is deemed to be 'information'…the next step is to determine whether providing that information to the AME was prohibited." (*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 144.) Regardless of whether Mr. Paul's letter was received by Mr. Leiser, there is no evidence that Mr. Paul served applicant with Dr. Paul's report 20 days before providing it to Dr. Weber. Furthermore, the record reflects that Mr. Leiser subsequently objected to service of Dr. Paul's report to the internal QME so the evidence indicates that the parties did not agree to provide this information to Dr. Weber.

A. Medical Records And Nonmedical Records Are Treated Differently By The Labor Code.

Section 4062.3(a)(1) provides that any party may provide to the QME "[r]ecords prepared or maintained by the employee's treating physician or physicians." Section 4062.3(a)(2) further provides that any party may provide to the QME "[m]edical and nonmedical records relevant to determination of the medical issue." While section 4062.3(a)(2) and *Maxham* define "information" as including both medical and nonmedical records relevant to determination of the medical issue, section 4062.3(b) specifies that "[i]f the opposing party objects to consideration of *nonmedical records* within 10 days thereafter, the records *shall not* be provided to the evaluator." (§ 4062.3(b), emphasis added.) Accordingly, if the opposing party timely objects to nonmedical records proposed to be served to the QME, those records shall not be provided to the evaluator pursuant to the plain language of section 4062.3(b) unless the trier of fact

so orders. "Either party may use discovery to establish the accuracy or authenticity of nonmedical records." (§ 4062.3(b).)

Although section 4062.3(b) does not give a specific timeline for the opposing party to object to the QME's consideration of medical records, the opposing party must object to the provision of medical records to the QME within a reasonable time in order to preserve that objection.[10] The failure to object at the first opportunity may be construed as an implicit agreement by the opposing party to provision of the information to the QME. (See e.g., *U.S. Auto Stores v. Workmen's Comp. Appeals Bd.* (*Brenner*) (1971) 4 Cal.3d 469, 476-477 [36 Cal.Comp.Cases 173]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) Additionally, the failure to object at the first opportunity may improperly permit the opposing party to learn the effect of the information on the QME's opinions before lodging an objection. (See *Fajardo v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1158 (writ den.) [a party cannot wait until after receipt of an untimely report to make an objection based on timeliness and request a replacement QME panel].)

B. The Parties Should Make A Good Faith Effort To Informally Resolve Disputes About What Information To Provide To The QME.

Section 4062.3(b) mandates service of information a party proposes to provide to the QME to the opposing party "20 days" before providing it to the QME. This 20-day time period indicates an intent to provide the parties with an opportunity to review the proposed information and informally agree on what information may be provided to the QME. (See Civ. Code, § 3532 ["[t]he law neither does nor requires idle acts"].) Sending information to the QME without serving the opposing party pursuant to section 4062.3(b) deprives the opposing party with an opportunity to review and object, as appropriate, to that information. The Legislature presumably mandated a full 20 days to provide parties with sufficient time to review and agree on the information to be provided to the QME. (See e.g., *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956, 968 (Appeals Board en banc) [former section requiring 10 days for parties

[10] Unlike nonmedical records, section 4062.3(b) is silent regarding the course of action if the opposing party objects to consideration of *medical* records proposed to be provided to the QME.

to agree to an AME before requesting a QME panel "envisions use of this time period for negotiation and selection of an AME"].)

The "meet and confer" provisions in the Civil Discovery Act are useful in evaluating how parties may comply with section 4062.3(b). (Code Civ. Proc., § 2016.010 et seq.) Although workers' compensation proceedings are not strictly "bound by the common law or statutory rules of evidence and procedure," the Code of Civil Procedure may provide guidance in governing workers' compensation proceedings in a manner "which is best calculated to…carry out justly the spirit and provisions of this division." (Lab. Code, § 5708; see e.g., *City of Anaheim v. Workers' Comp. Appeals Bd.* (*Beteag*) (1981) 116 Cal.App.3d 248, 255 [46 Cal.Comp.Cases 318] [the provisions of the Code of Civil Procedure regarding venue do not strictly apply in workers' compensation proceedings, but may "serve as an aid in determining the appropriate place for hearing"].) In civil discovery, a party must attach to certain discovery motions a "meet and confer" declaration "showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code Civ. Proc., § 2016.040.)

When faced with a dispute regarding whether to provide information to a QME, the parties should similarly make a good faith effort to informally resolve the dispute pursuant to the 20-day period mandated by section 4062.3(b). Informal resolution of these disputes helps to progress matters in an expeditious fashion and avoid involving the Appeals Board in disputes the parties are capable of resolving without judicial intervention. A moving party is obligated to swear under penalty of perjury that it made "a genuine, good faith effort to resolve [a] dispute" before seeking intervention from the Appeals Board through a declaration of readiness to proceed. (Cal. Code Reg., tit. 8, § 10414(d).) Accordingly, whether the parties engaged in good faith efforts to resolve a dispute arising under section 4062.3(b) may be considered by the trier of fact in addressing these disputes pursuant to the discussion below.

C. The Trier Of Fact Has The Authority To Address Disputes Regarding What Information May Be Provided To A QME.

The Legislature has conferred on the Appeals Board "vesting power, authority and jurisdiction…with all the requisite governmental functions to determine any dispute or matter arising under…" the workers' compensation system. (Cal. Const., art. XIV, § 4.) This authority includes "judicial

powers." (Lab. Code, § 111; see also *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355 [the Appeals Board has been "legislatively endowed with judicial powers pursuant to a specific constitutional authorization"]; *Western Metal Supply Co. v. Pillsbury* (*Mason*) (1916) 172 Cal. 407, 410-411 [the "power granted to the [former Industrial Accident Commission]…is judicial in its nature"].) The Labor Code expressly vests the Appeals Board with the "power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under [the Labor Code]." (Lab. Code, § 133; see also Lab. Code, §§ 5300, 5301 [the Appeals Board is vested with full power, authority and jurisdiction to try and determine any matter under Division 4 of the Labor Code].)

The Appeals Board's judicial powers extend to discovery disputes. The WCJs are empowered with "the powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the appeals board." (Lab. Code, § 5310; see also Cal. Code Regs., tit. 8, § 10348 [specifies that the WCJs have "full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case"].) The Court of Appeal has opined that "section 5310 supports the conclusion that WCJs have authority to decide discovery disputes." (*Allison v. Workers' Comp. Appeals Bd*. (1999) 72 Cal.App.4th 654, 662 [64 Cal.Comp.Cases 624] (citing *Hardesty v. McCord & Holdren, Inc*. (1976) 41 Cal.Comp.Cases 111 (Appeals Board panel decision).)

The WCJs consequently have the authority to address discovery disputes, which includes disputes regarding what information may be provided to the QME. If the parties cannot informally agree on what information to provide to the QME, the trier of fact is empowered to determine whether the information may be provided to the QME.

III. Section 4062.3 Provides A Specific Remedy For Ex Parte Communications With A QME, But Not For A Violation Of Section 4062.3(b).

A. Section 4062.3(g) Expressly Provides For A New QME If There Is An Ex Parte Communication With The QME And The Aggrieved Party Elects To Terminate The Evaluation.

Section 4062.3(e) requires that "communications with a [QME] before a medical evaluation" must be served on the opposing party "20 days in advance of the evaluation." As discussed above, section

4062.3(e) further states that "[a]ny subsequent communications" with the QME must be simultaneously served on the opposing party, but does not require service in advance for subsequent communications. Although the timelines differ for service of communications with the QME before a medical evaluation and any subsequent communications, section 4062.3(e) requires both types of communication be in writing and be served on the opposing party to avoid ex parte communication with the QME.

If a party engages in ex parte communication with the QME in violation of section 4062.3(e), section 4062.3(g) expressly provides that "the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator." (§ 4062.3(g).) As stated by the Court in *Alvarez*, if there is an ex parte communication with the QME, "the aggrieved party has a remedy." (*Alvarez*, *supra*, 187 Cal.App.4th at p. 586.) The *Alvarez* Court justified this express remedy as follows:

> In a field that is dependent on expert medical opinions, the impartiality and appearance of impartiality of the panel-qualified medical evaluator is critical. Thus, there are justifications for a strict rule prohibiting all ex parte communications in this context.

(*Id.* at p. 589.)

However, section 4062.3(g) specifies that the aggrieved party "*may* elect to terminate the medical evaluation." (§ 4062.3(g), emphasis added.) The use of "'may' is permissive" in the Labor Code. (Lab. Code, § 15.) Section 4062.3(g) alternatively permits the aggrieved party to elect to proceed with the evaluation although there was an ex parte communication with the QME. The remedy of a new QME thus does not occur automatically. If the aggrieved party wishes to elect to terminate the evaluation due to an ex parte communication, the aggrieved party must exercise its right to seek a new evaluation within a reasonable time following discovery of the prohibited communication. Conduct by the aggrieved party that is inconsistent with an election to terminate the evaluation may be construed as forgoing its right to terminate the evaluation and seek a new QME. (See *Fajardo*, *supra*, 72 Cal.Comp.Cases 1158.) Inaction by the aggrieved party following discovery of the ex parte communication is in effect an election to proceed with the QME.

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B. The Trier Of Fact Has Wide Discretion To Determine The Appropriate Remedy For A Violation Of Section 4062.3(b).

In 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). Due to this distinction, evaluation of whether a party has provided information to the QME in violation of section 4062.3(b) is an independent inquiry from the question of whether there was ex parte communication with the QME.

In *Maxham*, the Appeals Board opined as follows:

> If the WCJ determines that applicant improperly provided 'information' to the AMEs, he has wide discretion in fashioning an appropriate remedy for the violation of section 4062.3(c). Because this case does not involve an improper ex parte communication with an AME, removal of that AME may not be warranted.

(*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 147.) The trier of fact similarly has wide discretion in fashioning an appropriate remedy for a violation of section 4062.3(b) pursuant to the Appeals Board's judicial powers to address discovery disputes as discussed above. (See also *Allison*, *supra*, 72 Cal.App.4th at p. 664 ["WCJs have authority to hear discovery disputes and make orders respecting the same"].) In determining the appropriate remedy for a party's violation of section 4062.3(b), factors the trier of fact may consider include, but are not limited to, the following, as relevant:

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.

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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.)

Following consideration of all relevant factors, the trier of fact may determine the appropriate remedy for a violation of section 4062.3(b). Although the trier of fact may conclude that the appropriate remedy is a new QME, the trier of fact may conclude that other relief besides a new QME, or in addition to a new QME, is more appropriate for a party's violation of section 4062.3(b) depending on the circumstances.

IV. Upon Return To The Trial Level, The Trier Of Fact Must Determine If There Was An Ex Parte Communication With The QME And The Appropriate Remedy For Violation Of Section 4062.3(b).

In the instant matter, the WCJ found that Mr. Paul's letter to the QME Dr. Weber was an ex parte communication because Mr. Leiser did not receive a copy of the letter. The parties dispute whether Mr. Paul's letter to the QME was an ex parte communication because the letter lists Mr. Leiser as a copied party, but Mr. Leiser's letters in evidence state that he did not receive it.

Section 4062.3(b) requires that information that a party proposes to provide to the QME "shall be *served* on the opposing party." (§ 4062.3(b), emphasis added.) Likewise, section 4062.3(e) requires simultaneous service on the opposing party of all communications sent to the QME subsequent to the evaluation. For service by mail, WCAB Rule 10505(d) provides that:

> [P]roof of mail service may be made by: (1) affidavit or declaration of service; (2) written statement endorsed upon the document served and signed by the party making the statement; or (3) letter of transmittal. The proof of service shall set forth the names and addresses of persons served, the fact of service by mail, the date of service, and the address(es) to which mailing was made.

(Cal. Code Regs., tit. 8, § 10505(d).) The Rule specifies how a party may establish proof of mail service of information or communications on the opposing party in accordance with sections 4062.3(b) and (e). Thus, evidence of service on the opposing party in accordance with sections 4062.3(b) and (e) establishes

compliance by the sending party with that section. (See *Heinlen v. Heilbron* (1892) 94 Cal. 636, 640 [service by mail is complete at the time of deposit in the mail].)

"A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641; see also *AO Alfa-Bank v. Yakovlev* (2018) 21 Cal.App.5th 189, 212; *Hagner v. United States* (1932) 285 U.S. 427, 430 ["[t]he rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"]; *Minniear v. Mt. San Antonio Community College District* (1996) 61 Cal.Comp.Cases 1055, 1059 (Appeals Board en banc) [typical presumption affecting the burden of producing evidence "is the presumption that a mailed letter was received"].)

If the opposing party alleges that the information was not received, the WCJ may separately consider lack of receipt of the information by the opposing party in evaluating whether equitable relief is warranted even though the sending party complied with section 4062.3(b). The presumption that a letter mailed was received is rebuttable. (*People v. Smith* (2004) 32 Cal.4th 792, 799.) However, the trier of fact is obligated to "assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence." (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421.) A mere allegation that the recipient did not receive the mailed document has been found to be insufficient to rebut the presumption. (See *Alvarado v. Workmen's Comp. Appeals Bd.* (1970) 35 Cal.Comp.Cases 370 (writ den.) and *Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460 (writ den.).) If the sending party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce "believable contrary evidence" that it was not received. (*Craig, supra*, at pp. 421-422, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12.) Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received." (*Id*.)

Upon return of this matter to the trial level, the trier of fact should provide the parties with an opportunity to present further evidence regarding whether Mr. Paul's April 19, 2016 letter to the QME Dr. Weber was properly served to and received by Mr. Leiser. (See Lab. Code, §§ 5701, 5906; *Garza, supra*,

3 Cal.3d 312.) If the trier of fact concludes that there was an ex parte communication with the QME, the trier of fact must evaluate whether the aggrieved party elected to terminate the evaluation and proceed with a new evaluation within a reasonable time following discovery of the prohibited communication.

Alternatively, if the trier of fact concludes that Mr. Paul's letter was not an ex parte communication with the QME because it was properly served, the trier of fact must then evaluate the appropriate remedy for violation of section 4062.3(b), if any. Mr. Paul was required to serve Dr. Paul's report to Mr. Leiser 20 days before providing this information to Dr. Weber pursuant to section 4062.3(b). There appears to be no dispute that this did not occur. Upon return to the trial level, the trier of fact may determine an appropriate remedy, if any, for this violation pursuant to the analysis above.

V. Removal Is The Appropriate Procedural Avenue To Challenge A Decision Regarding Disputes Over What Information To Provide To The QME And Ex Parte Communication With The QME.

ICW filed its Petition seeking reconsideration, and in the alternative, removal. A petition for reconsideration may only be taken 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].)

In *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 663 [81 Cal.Comp.Cases 1122], the Court of Appeal evaluated which orders by the Appeals Board are final and subject to review by reconsideration. The Court held that "certain threshold issues, if finally determined, qualify as final orders." (*Id.* at p. 662.) "Such issues, if finally determined, may avoid the necessity for further litigation and hence render workers' compensation litigation more expeditious and inexpensive." (*Id.*, internal citations and quotations omitted.) Applying this approach, the Court found

that the issue of ex parte communication with a QME was not a threshold issue because resolution of this issue "will not avoid the necessity of further litigation." (*Id.*)

Accordingly, a petition for removal is the appropriate procedural avenue to challenge a decision regarding a party's improper provision of information to a QME or ex parte communication with a QME. The Findings in this matter only resolved issues regarding the proper psychiatric QME and whether applicant was entitled to a new internal medicine QME. These are discovery disputes regarding the medical-legal process and consequently, the Findings did not determine a substantive or threshold issue. The proper procedural avenue to challenge the WCJ's Findings is through removal rather than reconsideration.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, 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, § 10843(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, § 10843(a).)

We are unable to determine under the current record if there was an ex parte communication with the QME and are thus unable to determine if ICW will suffer substantial prejudice or irreparable harm as a result of the Findings. Removal is therefore warranted to permit the trier of fact to determine whether there was an ex parte communication with the QME. If the trier of fact concludes that Mr. Paul's letter was not an ex parte communication with the QME because it was properly served, the trier of fact must then evaluate the appropriate remedy, if any, for violation of section 4062.3(b) in accordance with the analysis above.

Therefore, we will vacate our grant of reconsideration, dismiss ICW's Petition as one for reconsideration and grant ICW's Petition as one for removal. As our decision after removal, we will rescind the Findings and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Opinion and Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on June 1, 2018 is **VACATED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the workers' compensation administrative law judge on March 8, 2018 is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of the Findings of Fact, Order and Opinion on Decision issued by the workers' compensation administrative law judge on March 8, 2018 is **GRANTED**.

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IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Findings of Fact, Order and Opinion on Decision issued by the workers' compensation administrative law judge on March 8, 2018 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion**.**

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Katherine A. Zalewski
KATHERINE A. ZALEWSKI, Chair

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

/s/ José H. Razo
JOSÉ H. RAZO, Commissioner

/s/ Juan Pedro Gaffney R.
JUAN PEDRO GAFFNEY R, Commissioner

/s/ Katherine Williams Dodd
KATHERINE WILLIAMS DODD, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

10/23/2018

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

ALBERT AND MACKENZIE
BRADFORD & BARTHEL
LAW OFFICES OF BRYAN LEISER
SANDAB SUON

AI/ara