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JANUARY 24, 2017

SIGNIFICANT DECISION 17-01

BRADLEY MAXHAM V CALIF DEPT OF CORRECTIONS AND REHABILITATION

**WORKERS' COMPENSATION APPEALS BOARD – EN BANC
ADJ3540065 (SAC 0361552)**

FILED: JANUARY 23, 2017

As defined by §4062.3, information submitted to an AME requires prior approval from both parties, but communications to an AME do not require prior agreement.

Significance: In an *en banc* decision, the Appeals Board has clarified the distinction between “communication” to an AME, and “information” provided to an AME, as those terms are used in Labor Code §4062.3.

Facts: The parties agreed to utilize AMEs in three specialties. As is customary in Northern California, applicant submitted proposed advocacy letters to defendant in advance. The letters included detailed references to case law (*Benson, Almaraz/Guzman, and Cannon*), a description of the law surrounding “synergistic effects,” and a statement that applicant had reached the statutory limit for temporary disability indemnity. Additionally, the letters included a request for consideration of activities of daily living, and attached a “Residual Functional Capacity Assessment” form to be completed by the physician. At least one letter purportedly included the WCJ’s prior F&A in the case, which itself referenced portions of the medical record. Defendant immediately objected, and requested that the letters be redrafted. Instead, and over defendant’s objections, applicant sent the letters to the physicians.

Defendant filed a DOR. After trial, the WCJ initially determined that the letters did not constitute “information” under §4062.3(c), which would have required prior agreement on matters provided to the evaluator. Instead, the WCJ held that the letters merely constituted “communications” under §4062.3(f), which requires only that the matter be served in writing to the opposing party at the time it is sent to the AME. But in response to defendant’s Petition for Removal, the WCJ changed his mind and, because the letters likely constituted both “communications” and “information,” recommended that Removal be granted.

Holding: The Appeals Board *en banc* held that “information” 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; and that a “communication” 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. The Appeals Board granted the extraordinary remedy of Removal, and remanded the case to the trial level.

Discussion: A careful reading of §4062.3 exposes the (perhaps unintentionally) complex definitions of what can and cannot be sent to a medical-legal evaluator. Under §4062.3(c), the parties must agree to any “**information**” provided to an AME. But if a party wishes to send a “**communication**” to an AME, it is necessary only to serve the opposing party with that communication. Obtaining an opposing party’s consent regarding a “communication” with an AME is not necessary under §4062.3(f).

The Appeals Board has previously recognized that a letter to a physician may constitute both “communication” as well as “information.” In this case, the Appeals Board has concluded that “if the correspondence or letter contains, references, or encloses (1) records prepared or maintained by a treating physician, or (2) medical and nonmedical records relevant to the determination of the medical issue, then it constitutes “information” and must be the subject of an agreement between the parties before it is submitted to the AME. The case was remanded back to the trial judge for a determination of whether the parties had agreed to submit the information to the AMEs.

In what may turn out to be the most significant point of this *en banc* decision, the Appeals Board opined that the portions of the letters containing applicant’s legal position and review of case law did not constitute “information” requiring prior approval by the defendant. Because applicant’s discussion of his legal position did not include records prepared or maintained by the treating physician, or medical/nonmedical records relevant to the determination of a medical issue, the Appeals Board determined that “those portions of applicant’s advocacy letter are not objectionable.” Recognizing that this particular point is a shift from past panel decisions, the *en banc* Appeals Board stated: “Despite our previous indications to the contrary, engaging in legitimate ‘advocacy’ does not transform correspondence with a medical examiner from ‘communication’ into ‘information.’” Nevertheless, the decision warns parties against misrepresentation of factual or legal issues, noting that the WCJ retains wide discretion to ensure that the parties’ advocacy letters do not confuse or misdirect the attention of the medical examiner, even if the “communication” does not technically constitute “information.”

In a footnote, the decision points out that “information” can still be submitted to an AME if the parties have previously agreed to submit it: “[L]itigants are entitled to reference [information as defined by §4062.3] in advocacy letters if the parties have previously agreed to provide that referenced ‘information’ to the AME.” Often, practitioners will send a letter confirming the AME agreement that also purports to “confirm” an agreement to provide a litany of information (*e.g.*, a deposition transcript, ADL checklist, or *sub rosa* videotape evidence) that may well be objectionable from the opposing party’s perspective.

As an *en banc* decision, this case is binding precedent on all WCJs and future Appeals Board panels. Applicant has 20 days in which to seek Reconsideration, or 45 days in which to convince a Court of Appeal that the case represents a “final order” subject to judicial review. Otherwise, the matter has been remanded to the trial level for development of the record.

ESL/