California Workers' Compensation Institute

Significant Decision

No. 18-07 October 25, 2018

SUON V. CALIFORNIA DAIRIES, ET AL.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)
(ADJ9013590, ADJ9014316, ADJ9489408)

FILED: OCTOBER 23, 2018

In an en banc decision, the WCAB has provided instructions for the application of its prior en banc decision in *Maxham v. California Dept. of Corrections*, applying a "reasonableness" standard for the time to object to provision of certain records to a QME and to terminate the evaluation upon discovery of a prohibited communication.

Significance: Where a party objects to a QME's consideration of medical records, the party must object within a reasonable time, and must seek a new evaluation within a reasonable time following discovery of any prohibited communication.

Facts: In three consolidated cases with multiple defendants, applicant was evaluated by PQME Robert Weber, M.D., for internal medicine and by PQME Robindra Paul, M.D., as a psychiatric evaluator. Thereafter, counsel for The Hartford sent a copy of Dr. Paul's report to Dr. Weber, requesting a supplemental report. The letter listed both co-defendant ICW and applicant's attorney as receiving a copy, but there was no proof of service. Dr. Weber issued a report dated 8/31/2016 in which he reviewed Dr. Paul's report without changing his previous opinions. On 9/20/2016 and 10/4/16, applicant's attorney notified The Hartford in writing that he never received the letter to Dr. Weber requesting a supplemental report. Following trial, the WCJ found that The Hartford had violated §4062.3(b) and engaged in *ex parte* communication by providing Dr. Weber with medical information without first informing applicant. The WCJ ordered the parties to obtain a new panel for internal medicine or agree to an AME, and ordered that the reports and deposition of Dr. Weber not be submitted to the new evaluator. ICW appealed.

Holding: In a 20-page, multi-part decision, the en banc Appeals Board held as follows:

1. Written communication with the QME that is properly served to the opposing party is not *ex parte*;
2. Even if a communication is not *ex parte*, it must be determined whether, under *Maxham*, the materials sent to a QME nonetheless constituted "information" under §4062.3(b):
    a. "information" constitutes records prepared or maintained by a treating physician and/or medical and nonmedical records relevant to the determination of medical issues
        i. provision of "information" to an evaluator requires the parties' prior agreement, and must be served 20 days before provision to the evaluator
        ii. if the opposing party objects to consideration of *medical* records, the objection must be made within a reasonable time and the failure to object at the first opportunity may be construed as implicit agreement
        iii. if the opposing party objects to consideration of *nonmedical* records within 10 days, the records shall not be provided to the evaluator absent a WCJ order

b. "communication" is everything else, but a "communication" can constitute "information" if it contains, references, or encloses "information" as defined above
    i. a party wishing to send a mere "communication" subsequent to the initial evaluation need only serve the opposing party with that communication

Parties disputing information to be provided to a QME should make a good-faith effort to informally resolve the dispute during the 20-day period under §4062.3(b). Failure to do so may be considered by the WCJ, who has the authority to determine whether the disputed information may be provided to the QME.

In this case, the Appeals Board found one obvious and one potential violation. First, The Hartford was required to serve Dr. Paul's report ("medical information") to applicant's attorney 20 days before providing it to Dr. Weber, and to obtain his agreement, and failed to do so. On remand, the WCJ was instructed to use her "wide discretion" to determine the appropriate remedy for this violation of §4062.3(b). Second, the Appeals Board ordered the WCJ to determine whether The Hartford's letter to Dr. Weber was in fact properly served and received — or whether The Hartford also violated the prohibition against *ex parte* communications with the QME. If there was an *ex parte* violation, then the WCJ must determine whether the aggrieved party objected within a reasonable time following discovery of the prohibited communication.

Discussion: The ultimate result in this case is hardly surprising. Had the Appeals Board upheld the WCJ's decision ordering a new internal medicine evaluator and striking all of Dr. Weber's opinions, The Hartford would actually have been rewarded for its improper interference in communicating with the PQME.

This case provides guidance as to what may be provided to a medical-legal evaluator, when it must be provided, and what remedies are available for any violation. As an en banc decision of the Appeals Board, it represents binding precedent on all future Appeals Board panels and WCJs. Unfortunately, other than providing a step-by-step outline for parties and WCJs to follow, the decision does not provide much in the way of new rules. For example, the decision does not take the opportunity to provide hard time limits for objections to *medical* evidence, nor does it define the penalty for sending medical records to a QME without sending them to the opposing party 20 days in advance. Furthermore, the Board did not discuss why the evident violation of §4062.3(b) did not automatically constitute a violation of the prohibition against *ex parte* communications with the PQME, pursuant to 8 CCR §35(g).

The Appeals Board's discussion of the available remedies represents the most important takeaway. Contrary to popular belief, a new panel is not to be automatically awarded upon a finding of a violation. This decision holds that the WCJ has "wide discretion" to conclude that a new QME is appropriate, or that "other relief besides a new QME, or in addition to a new QME, is more appropriate," depending on the circumstances. The relevant factors include: the prejudicial impact versus the probative weight of the disputed information; the reasonableness, authenticity, and relevance of the disputed information to the determination of medical issues; the timeline of events, including evidence of proper service, attempts to cure any violation, and when the objection was made; case-specific reasons that justify replacing or keeping the current QME, including the length of time the QME has acted in the case; the degree to which the parties engaged in good faith efforts to agree on information to be provided; and the constitutional mandate to accomplish substantial justice expeditiously, inexpensively, and without encumbrance.

Unfortunately, the "wide discretion" as to available remedies will undoubtedly result in disparate outcomes and enforced uncertainty as parties continue to litigate these types of disputes.

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