WCAB Further Defines Medical-Legal Communication and Record

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In late October 2018 the California Workers' Compensation Appeals Board (WCAB) issued an en banc opinion in the case of *Sandab Suon v. California Dairies (Suon)* (2018) 83 Cal.Comp.Cases 1803, addressing medical-legal communication and record review. Since en banc decisions, meant to opine on issues of importance for the workers' compensation community, are not commonplace and are binding precedent on all WCABs and workers' compensation judges, they are worthy of close consideration.

In *Suon* the WCAB addressed in detail procedural requirements and remedies related to the transmission of information to medical-legal evaluators (qualified medical examiners [QMEs] and agreed medical examiners [AMEs]) that either violates the Labor Code or ignores an opposing party's timely objection. In so doing, the *Suon* court expanded on the previous en banc decision in *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, which distinguished *information* from *communications* that were or were not subject to objection.[1]

Briefly, let's consider the underlying facts of *Suon*. Three consolidated cases were in litigation when a panel qualified medical evaluation (PQME) in orthopedics went forward on one of the cases. The applicant's attorney deposed panel QME Dr. Weber. During the deposition the doctor indicated he wanted to review the report of the QME in psychiatry, Dr. Paul, and issue a supplemental report. Thereafter, defendant sent a unilateral correspondence to Dr. Weber transmitting the psych QME report and asking that he comment on it. No proof of service was attached to the letter, although it was alleged that it was concurrently served on applicant's attorney. Dr. Weber then issued a supplemental report, noting his opinions remained "unchanged" after his review of Dr. Paul's QME report.

Prior to Dr. Weber's supplemental report, applicant's attorney wrote to one defendant, advising that he had heard from a codefendant that a letter had been sent to Dr. Weber that had not been served on his office. Applicant's attorney subsequently objected when he received the supplemental report from the QME, again alleging that he had not been served with the request for a supplemental report, such that an ex parte communication had occurred and the worker should be able to replace Dr. Weber and exclude him from the case. At trial, the WCJ found defendant had violated Labor Code section 4062.3(b) and ordered a replacement panel; an appeal followed.

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The en banc WCAB began by clarifying that an *ex parte communication* is a communication occurring when opposing counsel is not present. Therefore, the opinion states, when a party violates a time frame for action but copies opposing counsel on the communication, there has

not been an ex parte violation even if there has been some other statutory violation. (Despite this, it is not unusual to hear attorneys at the WCAB alleging ex parte violations that were in fact not ex parte but arguably violated some other statutory provision.)

The *Suon* panel next addressed applicant's argument that he was not served with the supplemental report request. The WCAB noted that where service is by mail, there is a rebuttable presumption it was delivered to an opposing party. However, when a party objects that they were never served, the issue becomes a question of fact, and the WCJ must determine whether service did in fact occur. This issue was remanded to the WCJ for further development. In the absence of a proof of service, the WCAB noted that defendant would need to produce other evidence suggesting applicant's attorney had actually been served, or an ex parte violation may be found. For this reason, *always* include a proof of service when you are serving records or communications on the QME or AME, in case a dispute subsequently emerges.

The en banc panel then considered non–ex parte communications that nevertheless could be found to violate the Labor Code. The panel cited Labor Code section 4062.3(e), which requires that "information" be served on an opposing party at least 20 days prior to being sent to a QME. Similarly, "communications" with a QME must be served on a party at least 20 days in advance of an evaluation. Absent waiver, the Labor Code prohibits service of communication or information on a QME with fewer than 20 days' notice on an opposing party.

In addressing the objection process of Labor Code section 4062.3, the new and most relevant aspect of the *Suon* opinion is the WCAB's determination that a party may object to the proposed transmission of *medical* records to medical-legal evaluators. The Labor Code is silent as to a right or method to object to such records being sent to the QME as part of the evaluation process. The Labor Code expressly provides the right to object to *nonmedical* records per Labor Code section 4062.3(2)(e), and said objection must be raised no later than 20 days from service. This code section is notably silent as to any right to object to medical records. Previously, many have posited that there was no right to object to the transmission of medical records to the QME, given the omission in the code of any prohibition or method to object.

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Post *Suon,* the WCAB has also addressed the issue of an objection to medical records being sent to a medical legal examiner. In their split decision in *Harden v. County of Sacramento*, 2019 Cal.Work.Comp. P.D. LEXIS 504, the WCAB applied *Suon*'s analysis of Labor Code section 4062.3 in its finding that an applicant's independent medical examinations procured solely for the application of a disability retirement claim—and unrelated to the applicant's workers' compensation claim—could be submitted to medical-legal evaluators.[2] The majority considered many factors in their decision, including these:

- IMEs are not comprehensive medical evaluations under Labor Code section 4062.2; nor are reports obtained under Labor Code section 4605 or 4604(d).
- IMEs were not obtained for the IW's workers' compensation claim merits.
- IMEs are not being offered as comprehensive medical evaluations, so whether they are compliant with Labor Code section 4062.2, 4605, or 4064 is irrelevant.
- QME rule 35(e) does not bar submission to an AME or a PQME since IMEs did not address issues of WCAB-awarded permanent impairment, PD, or apportionment under the California workers' compensation law; rather, they addressed the worker's eligibility for non-California workers' compensation benefits, which is a completely separate process from California workers' compensation.
- After reviewing *Batten*, the panel found the disputed IMEs were not obtained solely to rebut a PQME's opinion.
- After review of Labor Code section 4062.3(a) and Evidence Code section 210, the majority found the disputed IMEs were relevant to determining the medical issues present in the worker's workers' compensation claim and therefore could be provided to the medical-legal examiners.

The concept that due process requires all relevant evidence to be reviewed appears to have weighed into the *Harden* decision making. Moving forward, using the standard of weighing the relevance of medical records to the medical-legal dispute pending would also appear to be a step in eliminating baseless objections to delay medical-legal examinations and attempts to shield examiners from pertinent information.[3]

Although the Labor Code is silent on the ability to object to medical records and thus is also silent on any time frame to lodge such an objection, the WCAB has now declared that to preserve the objection, an opposing party may object to medical records within a "reasonable time." The WCAB did not define that phrase.

The question of what constitutes a reasonable time for a party to object to medical records is sure to inspire new rounds of litigation. However, it is possible to infer a number of factors that would likely inform this standard. First, the Labor Code provides 20 days for an opposing party to object to nonmedical records being sent to a QME. Therefore, a reasonable time to object would presumably be 20 days or less when considering the analogous time frame of Labor Code section 4062.3. Additionally, the California Civil Code section the WCAB adopted provides 5 additional days to any act where service is by U.S. mail. Therefore, another inference is that a party must have more than 5 days to lodge an objection following service of proposed advocacy letters or records. Thus, a reasonable time would likely be at a minimum 10 days and be no more than 20 days from service.

In a separate part of the decision, the WCAB noted that Labor Code section 4062.3(b) provides a full 20 days for a party to object; "presumably," the Legislature believed 20 days was "sufficient time to review and agree on the information to be provided to the QME." Therefore, the best practice is likely to treat all information and records as subject to the Labor Code section 4062.3(b) 20-day requirement regardless of whether the information may be construed as a medical or as a nonmedical record.

Additionally, the WCAB held that a "reasonable time" can be construed as lapsing based on the actions of the opposing party. Where the opposing party fails "to object at the first opportunity[, it] may be construed as an implicit agreement by the opposing party" that the information may be provided to the QME. The only example the WCAB provided of implicit waiver was that a party may not object after receiving a report from a QME and determining whether it was favorable.

The WCAB has also emphasized that anytime an objection concerning what information or communication may be sent to the QME is raised that cannot be informally resolved, the parties should present the issue to the WCAB for a formal ruling to resolve the dispute.

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Where a party transmits information to a QME over the objection of another party or violates the procedural timelines of the Labor Code, the aggrieved party has the option to terminate the planned report and request a replacement evaluator. However, the aggrieved party must take action to replace the evaluator "within a reasonable time" to avoid a presumed waiver of their objection.[4]

Suon states that the trier of fact (the WCJ) is empowered with "wide discretion" to determine the appropriate remedy for a violation of Labor Code section 4062.3(b). Judges would therefore appear to be able to consider when to allow a new panel and when to fashion a remedy to correct any procedural issues, as well as any ancillary remedies for having to address the issue. The WCAB advised that a judge is to consider six factors in determining whether to replace a QME following an objection or violation of Labor Code section 4062.3(b) regarding information sent to the QME:

1. The prejudicial impact versus the probative weight of information.
2. The reasonableness, authenticity, and, as appropriate, relevance of the information to the 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 encumbrance of any character."

(An internal citation and a quotation were omitted above.)

The *Suon* en banc panel ultimately remanded the case so the trier of fact could determine whether defendant's request for a supplemental report to Dr. Weber was an ex parte communication. There was no proof of service attached to the letter, so additional fact finding may be required.

A judge who found that no ex parte communication had occurred was directed to next address the Labor Code section 4062.3(b) violation since defendant had not waited 20 days to send the records to the QME. The judge was ordered to fashion an appropriate remedy based on the multifactor test the *Suon* WCAB had provided. Considering the QME had asked to review the medical-legal report in deposition and then had issued a supplemental report changing none of his opinions, it would not appear that the *Suon* multifactor test would support removing or replacing QME Weber in the instant matter.

There are several important takeaways from the *Suon* decision for claims professionals and attorneys:

- An ex parte violation occurs only where information is communicated to the QME without notice to opposing parties. In other words, you find out after the fact that an opposing party has communicated with the QME or AME.
- Where an ex parte violation occurs, the remedy for the aggrieved party is to replace the evaluator and obtain a new evaluation. Note that even where there is an ex parte violation, if the aggrieved party does not take affirmative action within a reasonable amount of time, waiver may be found. An aggrieved party should, then, move with alacrity to replace the QME to avoid facing an argument of waiver from opposing counsel.
- A violation of Labor Code section 4062.3(b) occurs when a party transmits "information" to a QME without waiting 20 days for the opposing party to object or when a party transmits information over the objection of the opposing party without resolving the dispute informally or through adjudication at the WCAB.
- Parties must engage in an informal meet-and-confer effort prior to filing a Declaration of Readiness to Proceed seeking the intervention of the WCAB. This is consistent with the Civil Discovery Act, which acts as guidance for workers' compensation litigation.
- Where parties cannot informally resolve a dispute concerning what information or records can be sent to the QME, the WCJ is empowered to address and resolve the discovery dispute.
- Where there has not be an ex parte communication but there has been a violation of the 20-day rule contained in Labor Code section 4062.3(b), a WCJ has wide discretion in fashioning the appropriate remedy and is directed to consider six factors in making their determination.
- A party aggrieved by a decision of the WCJ concerning the QME/AME process may file for removal with the WCAB.

In moving forward from *Maxham*, the WCAB has further refined issues of medical-legal communications and record review. The issue of potential objections to medical records is one that bears watching; the findings in this matter involving a psychological QME may be fact-specific to this case rather than intended to serve as a blanket allowance of objection to medical records. Such objections of course mean that WCJs will become more involved with the scope of what can be provided to a medical-legal examiner. This would seem to give rise to the need for fact finding in advance of a medical-legal exam, which creates more rather than less litigation surrounding the medical-legal process. Preclusion of medical records from the QME review would likely lead to due process or unsubstantial medical evidence arguments, such that we likely see additional decisions addressing the scope of any such objections.

Notes

1. In *Maxham*, the WCAB en banc advised that interactions between parties and medical-legal evaluators should be categorized as either "information" or "communication." The Appeals Board defined *information* as medical records applicant's treating physicians prepared or other medical and nonmedical records relevant to the determination of medical issues. A *communication,* conversely, would be a letter or oral communication not referencing information contained in medical or nonmedical records. A communication would be transformed into information if it referenced content contained within medical or nonmedical records.

2. Considering the relevance, due process, and other considerations and reasoning cited in *Harden,* this would seem to confirm that Longshore and Harbor Workers' Compensation Act evaluations, as well as other medical records and reporting relevant to pending workers' compensation issues, would be permissible to transmit to the medical-legal examiner. However, those medical reports or records would not otherwise be the basis for an award or a denial of any benefits. Such reports or records would simply constitute relevant information for a medical-legal examiner to review and consider.

3. As a practical matter, both applicant and defendant practitioners have inappropriately used "blanket objections," or objections without an articulable or a good faith basis, to delay the medical-legal process and extend a matter's current status. This tactic has the effect of forcing the cancellation of medical-legal exams and requiring practitioners to seek WCAB intervention to address objections lest a party run afoul of proper transmission. The tactic many times does not result in a WCAB decision, because objections are later withdrawn—and in consideration of the economics of acquiescing to a delayed medical-legal date that may actually occur before the WCAB can reach the merits of the objections, demonstrating *the success of the delay*. Nonetheless, the WCAB may take up a matter giving guidance on the scope and basis for medical-legal letter and exhibit objections. It may also fashion a remedy akin to a civil discovery motion, in which those who acted without substantial justification may face discovery sanctions.

4. In *Dollemore v. Wayne Perry, Inc./Starr Surplus Lines*, 2018 Cal.Wrk.Comp. P.D. LEXIS 528, the WCAB addressed the issue of impermissible ex parte communication and the timing needed for such an objection. In this matter, an ex parte communication to the PQME was learned of on September 6, 2017, and the Petition to Remove the PQME was filed on February 8, 2018 (a five-month span). The WCAB granted removal and remanded the case to the trial level to determine whether the objection had been done in a reasonable time and whether the objecting party had engaged in conduct inconsistent with an election to disregard the evaluation after learning of the ex parte communication. Also of note regarding the merits of any ex parte communication, the WCAB indicated that "an ex parte communication may be so insignificant that any resulting repercussion would be unreasonable."

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