

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **MARTIN TRAPERO,**

5 *Applicant,*

6 **vs.**

7  
8 **NORTH AMERICAN PNEUMATICS; STATE  
9 COMPENSATION INSURANCE FUND,**

10 *Defendant.*

Case No. **ADJ659011 (SDO 0266829)**  
**(San Diego District Office)**

**OPINION AND ORDERS  
VACATING ORDER GRANTING  
RECONSIDERATION, DISMISSING  
PETITION FOR RECONSIDERATION,  
GRANTING REMOVAL ON BOARD  
MOTION, AND DECISION AFTER  
REMOVAL**

11  
12 On June 30, 2011, the Workers' Compensation Appeals Board (Appeals Board) granted  
13 reconsideration to further study the factual and legal issues.<sup>1</sup> This is our decision after reconsideration.

14 In the Findings and Order of April 11, 2011, the workers' compensation judge (WCJ) concluded  
15 that there was no violation of Labor Code section 4062.3 when applicant's attorney handed a recently-  
16 procured vocational evaluation report to defense counsel a few minutes before the deposition of the  
17 Agreed Medical Evaluator (AME)<sup>2</sup> was to begin. The report was presented to the AME during the  
18 deposition.

19 Defendant, State Compensation Insurance Fund (SCIF), filed a timely petition for  
20 reconsideration. Defendant contended that: (1) applicant's attorney's "hand delivery method" of service  
21 was not a legally acceptable method of service intended by the Legislature under section 4062.3; (2) the  
22

23  
24 <sup>1</sup> The Appeals Board recognizes that this case has been pending on reconsideration for some time. During that time, this case  
received significant attention in the interest of resolving issues of statewide concern. Ultimately, however, it was determined  
that a future case might better serve the Board's purposes.

25  
26 <sup>2</sup> Under Division of Workers' Compensation (DWC) Rule 1(f), an AME is a physician selected by agreement between the  
claims administrator, or if none the employer, and a represented employee to resolve disputed medical issues referred by the  
parties in a workers' compensation proceeding. Under DWC Rule 1(s), "evaluators" include Qualified Medical Evaluators  
27 (QMEs), Agreed Medical Evaluators (AMEs), Agreed Panel QMEs or Panel QMEs, as appropriate in a specific case. (Cal.  
Code Regs., tit. 8, § 1.)

1 purpose of section 4062.3 is to protect the impartiality of the medical-legal process, and a party who  
2 initiates communication with an AME with only a few minutes prior notice to the opposing party may be  
3 perceived by the AME as attempting to influence the process; and (3) to interpret the statute in such a  
4 way as to permit applicant's attorney's "subsequent communication" would be to violate the principles of  
5 statutory construction.

## 6 BACKGROUND

7 Applicant, Martin Trapero, sustained an admitted industrial injury on March 3, 2000. The parties  
8 agreed to use multiple AMEs to resolve the case, including an agreement to use Dr. Thompson as their  
9 AME in orthopedics. Dr. Thompson examined applicant and issued a report dated June 19, 2008. On  
10 December 29, 2009, applicant's attorney noticed Dr. Thompson's deposition for January 11, 2010.  
11 Approximately five to eight minutes before the deposition began, applicant's attorney handed defense  
12 counsel a vocational evaluation report dated January 5, 2010, prepared by Mr. Mark Remas. The report  
13 was presented to Dr. Thompson after the deposition began. At page 23 of the deposition, when  
14 applicant's attorney attempted to ask Dr. Thompson to "take a look" at the vocational evaluation report  
15 and "perform a cursory review," defense counsel interjected: "I object to that."<sup>3</sup>

16 Based upon applicant's attorney's alleged violation of section 4062.3, defendant filed a petition to  
17 strike Dr. Thompson's report and deposition. The matter proceeded to hearing on March 28, 2011. The  
18 Minutes of Hearing described the issue as "whether or not the AME should be disqualified pursuant to  
19 defendant's allegation that applicant violated...section 4062.3(e)." The AME's deposition and the  
20 vocational evaluation report were admitted into evidence, and the WCJ heard oral argument.

21 In the Findings and Order issued April 11, 2011, the WCJ determined that, in serving the  
22 vocational evaluation report at the AME's deposition, applicant's attorney had only engaged in a  
23 permissible "subsequent communication with the medical evaluator" under section 4062.3(e), which  
24 requires service "on the opposing party *when sent* to the medical evaluator." (Italics added.) In his  
25 Opinion on Decision, the WCJ noted that defense counsel did not object to the deposition going forward  
26 pursuant to California Code of Civil Procedure (CCP) sections 2025.420(a), 2025.460(b), or 2025.470,  
27

<sup>3</sup> Joint Exhibit YY, admitted March 28, 2011. As pointed out by the WCJ, defendant did not raise any "CCP objections."

1 and that defense counsel "could have sought a protective order under CCP 2025.420(a)(b)(2)."  
2 Accordingly, the WCJ denied defendant's "Petition to Strike the report and deposition of AME Dr. Blake  
3 Thompson." For the reasons discussed below, we conclude that the WCJ erred.

#### 4 DISCUSSION

5 Section 4062.3 provides, in relevant part, as follows:

6 "(a) Any party may provide to the qualified medical evaluator selected from a panel any  
7 of the following information:

8 "(1) Records prepared or maintained by the employee's treating physician or  
9 physicians.

10 "(2) Medical and nonmedical records relevant to determination of the medical  
11 issue.

12 "(b) Information that a party proposes to provide to the qualified medical evaluator  
13 selected from a panel shall be served on the opposing party 20 days before the  
14 information is provided to the evaluator. If the opposing party objects to consideration of  
15 nonmedical records within 10 days thereafter, the records shall not be provided to the  
16 evaluator. Either party may use discovery to establish the accuracy or authenticity of  
17 nonmedical records prior to the evaluation.

18 "(c) If an agreed medical evaluator is selected, as part of their agreement on an evaluator,  
19 the parties shall agree on what information is to be provided to the agreed medical  
20 evaluator.

21 \*\*\*

22 "(e) All communications with an agreed medical evaluator or a qualified medical  
23 evaluator selected from a panel before a medical evaluation shall be in writing and shall  
24 be served on the opposing party 20 days in advance of the evaluation. Any subsequent  
25 communication with the medical evaluator shall be in writing and shall be served on the  
26 opposing party when sent to the medical evaluator.

27 "(f) 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.

"(g) The party making the communication prohibited by this section shall be subject to  
being charged with contempt before the appeals board and shall be liable for the costs  
incurred by the aggrieved party as a result of the prohibited communication, including the  
cost of the medical evaluation, additional discovery costs, and attorney's fees for related  
discovery."

1 Based on our reading of section 4062.3, we disagree with the WCJ's determination that  
2 applicant's attorney did not violate the statute when he served the new vocational report on defense  
3 counsel just before the AME's deposition. In reaching this conclusion, we are mindful that the  
4 impartiality and appearance of impartiality of the medical evaluator, whether an AME or PQME, is  
5 paramount. (See *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 589 [75  
6 Cal.Comp.Cases 817, 826].)

7 First, we note that the vocational report falls within the definition of "information" described in  
8 section 4062.3. That is, the vocational report is a "nonmedical record relevant to determination of a  
9 medical issue" under section 4062.3(a)(2). Furthermore, subdivision (c) states that if an AME is  
10 selected, "as part of their agreement on an evaluator, *the parties shall agree on what information is to be*  
11 *provided*" to the AME. (Italics added.)

12 Here, in springing the vocational report on defense counsel when the AME was about to be  
13 deposed, applicant's attorney denied defense counsel the opportunity to determine if this new  
14 "information" was something that he would agree to provide to the AME. Section 4062.3(c), in stating  
15 that the "information" that is to be provided to the AME must be agreed upon by the parties "as part of  
16 their agreement on an evaluator," makes clear that providing "information" to the AME is nothing casual,  
17 but goes to the heart of the AME agreement. If the "information" is not agreed to, the AME is not agreed  
18 to either. Defense counsel objected to the "information" during the AME's deposition, so it was not  
19 "information" that defense counsel agreed to, and it should not have been provided to the AME at that  
20 time.<sup>4</sup>

21 Furthermore, we disagree with the WCJ's conclusion that applicant's attorney's service of the  
22 new vocational report on defense counsel at the AME's deposition was a "subsequent communication"  
23 under the second sentence of section 4062.3(e). Although service of the vocational report was  
24

25 <sup>4</sup> Unlike the WCJ, we attach little significance to defense counsel's lack of objection under specific provisions of the Code of  
26 Civil Procedure. As discussed in this opinion, section 4062.3 includes specific remedies for violation of its provisions. It was  
27 sufficient that defendant objected to the new vocational report at Dr. Thompson's deposition and filed a petition for hearing by  
the WCJ. As stated in DWC Rule 35(k), "[t]he Appeals Board shall retain jurisdiction in all cases to determine disputes  
arising from *objections* and whether ex parte contact in violation of Labor Code section 4062.3 or this section of Title 8 of the  
California Code of Regulations has occurred." (Cal. Code Regs., tit. 8, § 35(k), italics added.)

1 "subsequent" to AME Thompson's initial medical evaluation and report, it was not merely a  
2 "communication" because it also contained "information" as defined in section 4062.3(a)(2). As  
3 explained above, under subdivision (c) the parties must agree on all "information" that is to be provided  
4 to the AME, and the "information" agreed upon goes to the heart of the AME agreement itself. Here,  
5 applicant's attorney violated that agreement.<sup>5</sup>

6 Based on the foregoing discussion, we conclude that when applicant's attorney handed the new  
7 vocational report to defense counsel and AME Thompson at the deposition, he made a communication  
8 prohibited by section 4062.3. Under subdivision (g), we find that applicant's attorney "shall be liable for  
9 the costs incurred by the aggrieved party as a result of the prohibited communication, including the cost  
10 of the medical evaluation, additional discovery costs, and attorney's fees for related discovery." We will  
11 return this matter to the WCJ to determine the exact amount of costs and attorney's fees.<sup>6</sup>

12 In addition, defendant had the right to terminate the medical evaluation and to seek a new  
13 evaluation, in accordance with section 4062.3(f). However, the fact that applicant's attorney violated  
14 section 4062.3 by hand-serving the vocational report on defense counsel at Dr. Thompson's deposition  
15 does not make the doctor's report dated June 19, 2008 inadmissible, because the June 19, 2008 report  
16 remains untainted. In further proceedings, therefore, the WCJ may admit and consider Dr. Thompson's  
17 June 19, 2008 report. However, the January 11, 2010 deposition is inadmissible, and Dr. Thompson is  
18 disqualified as the AME.

19 In closing, we note that the April 11, 2011 Findings and Order was not subject to challenge by a  
20 petition for reconsideration because it was not a final order, i.e., it did not determine a substantive issue  
21 such as entitlement to benefits. (Lab. Code, §§ 5900, 5902.) Therefore, we will vacate the Order  
22

23 <sup>5</sup> Although the second sentence of section 4062.3(e) does not state that "subsequent communications" with an AME must be  
24 served 20 days in advance, the requirement that "non-medical records" must be served 20 days in advance is found in DWC  
25 Rule 35(a)(5) and (c), with subdivision (d) providing the opposing party 10 days to object. (Cal. Code Regs., tit. 8, § 35.) In  
26 this case, applicant's attorney should have served the vocational report 20 days in advance of the AME's deposition, which  
would have allowed defense counsel 10 days to object. If that timing was impossible, the AME's deposition should have been  
postponed pending resolution of any dispute over providing the vocational report to the AME.

27 <sup>6</sup> Even if we had found subdivision (g) inapplicable, we still would have assessed costs and sanctions against applicant's  
attorney under authority of Labor Code section 5813, because his service of the new vocational report on defense counsel at  
the AME's deposition was an act of frivolous gamesmanship.

1 Granting Reconsideration of June 30, 2011, and we will dismiss defendant's petition for reconsideration.  
2 Pursuant to section 5310, however, we will grant removal on our own motion. As our Decision After  
3 Removal, we will rescind the WCJ's decision and replace it with an order disqualifying AME Thompson  
4 and striking his deposition. In addition, we will order the assessment of costs and attorney's fees against  
5 applicant's attorney pursuant to section 4062.3(g), the specific amounts to be determined by the WCJ.

6 Lastly, we will return this matter to the trial level for further proceedings by the WCJ, including  
7 but not limited to an opportunity for the parties to agree on a different AME or to obtain their own QMEs  
8 in orthopedics. (See *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [71  
9 Cal.Comp.Cases 155]; *Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [71  
10 Cal.Comp.Cases 161]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 [Appeals Board en  
11 banc]: The medical evaluation and reporting procedure of former section 4062 applies to represented  
12 cases with a date of injury before January 1, 2005.)

13 For the foregoing reasons,

14 **IT IS ORDERED**, as the Appeals Board's Decision After Reconsideration, that the Order  
15 Granting Reconsideration of June 30, 2011 is **VACATED**, and that defendant's petition for  
16 reconsideration is **DISMISSED**.

17 **IT IS FURTHER ORDERED**, that removal is **GRANTED** on the Board's own motion, and that  
18 as the Appeals Board's Decision After Removal, the Findings and Order of April 11, 2011 is  
19 **RESCINDED**.

20 **IT IS FURTHER ORDERED**, as the Appeals Board's Decision After Removal, that Dr.  
21 Thompson is **DISQUALIFIED** as the AME and his deposition of January 11, 2010 is **STRICKEN** from  
22 the record, provided, however, that the WCJ may admit and take into account Dr. Thompson's report of  
23 June 19, 2008 in considering the merits of applicant's injury claim herein.

24 **IT IS FURTHER ORDERED**, as the Appeals Board's Decision After Removal, that applicant's  
25 attorney shall pay defense counsel the costs and attorney's fees associated with AME Thompson's  
26 deposition of January 10, 2010, with the parties to adjust the exact amounts or the WCJ to determine the  
27 same absent adjustment.

