

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **BRADLEY MAXHAM,**

5 *Applicant,*

6 **vs.**

7 **CALIFORNIA DEPARTMENT OF**
8 **CORRECTIONS AND REHABILITATION;**
9 **STATE COMPENSATION INSURANCE**
10 **FUND,**

11 *Defendants.*

Case No. ADJ3540065 (SAC 0361552)

OPINION AND ORDER
GRANTING PETITION FOR
REMOVAL AND DECISION
AFTER REMOVAL
(En Banc)

12 Defendants California Department of Corrections and Rehabilitation and State Compensation
13 Insurance Fund seek removal in response to an Order (Order) issued by the workers' compensation
14 administrative law judge (WCJ) on June 2, 2016. In the Order, the WCJ found that applicant's counsel
15 did not violate Labor Code¹ section 4062.3 or WCAB Rule 35 (Cal. Code Regs., tit. 8, § 35) because she
16 served defendant with copies of letters she sent to three Agreed Medical Evaluators (AMEs) in this case.

17 Defendants contend that removal is appropriate because the Order will cause significant prejudice
18 and irreparable harm by permitting the three AMEs to consider "information" submitted by applicant's
19 attorney without defendants' approval, thus almost certainly resulting in biased AME reports.
20 (Petition, p. 2, ln. 1-5.)

21 We received an Answer from applicant. The WCJ filed a Report and Recommendation on
22 Petition for Removal (Report) on July 1, 2016, recommending that the Petition be granted, the Order be
23 rescinded, and the matter returned to him to consider the issue of whether the "communications" sent by
24 applicant also constituted "information." (Report, p. 3.).

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27 ¹ Unless otherwise stated, all further statutory references are to the Labor Code.

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

4 Based upon our review of the record, defendants' Petition for Removal, applicant's Answer, the
5 contents of the WCJ's Report, and the relevant statutes and case law, we hold that:

- 6 1. "Information," as that term is used in section 4062.3, constitutes (1) records prepared or
7 maintained by the employee's treating physician or physicians, and/or (2) medical and
8 nonmedical records relevant to determination of the medical issues.
- 9 2. A "communication," as that term is used in section 4062.3, can constitute "information" if
10 it contains, references, or encloses (1) records prepared or maintained by the employee's
11 treating physician or physicians, and/or (2) medical and nonmedical records relevant to
12 determination of the medical issues.

13 For the reasons discussed below, we thus grant defendants' Petition for Removal, rescind the
14 Order, and return this matter to the trial court for further proceedings consistent with this opinion.

15 I. BACKGROUND

16 The parties agreed to utilize Doctors Abeliuk, Johnson, and Lapins as AMEs in this case.
17 On October 28, 2015, applicant's counsel provided defendants with draft copies of letters to Doctors
18 Johnson and Abeliuk, asking if defendants had an objection to them. (March 25, 2016 Petition for Costs,
19 Ex. A.) The same day, defendants responded that they objected to both letters and asked applicant's
20 counsel to redraft and send the letters back for review. (*Id.*, Ex. B.) Defendants contend that applicant's
21 counsel then sent these letters to Doctors Abeliuk and Johnson over their objections.
22 (Petition, p. 3, ln. 4-7.)

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25 ² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs.,
26 tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5
27 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236]; see
also Gov. Code, § 11425.60(b).) In addition to being adopted as a precedent decision in accordance with Labor Code section
115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with
Government Code section 11425.60(b).

1 On November 18, 2015, applicant's counsel sent defendants' counsel a draft of a letter to
2 Dr. Lapins and asked if there was an objection. (March 25, 2016 Petition for Costs, Ex. D.) Defendants
3 objected to the proposed letter to Dr. Lapins on November 20, 2015. (*Id.*, Ex. E.) Specifically,
4 defendants requested that the following excerpted portions of the November 18, 2015 letter to Dr. Lapins
5 be deleted:

6 Please note that because of statutory limit of 104 weeks, no additional TD
7 payments will be made to Mr. Maxham.

8 . . .

9 In order for your opinion to be considered substantial evidence, you must give an
10 opinion as to the cause of the overall permanent disability. If the cause of the
11 permanent disability is inextricably intertwined between all of the injuries such
12 that a separate opinion of causation would be speculative, it may be that you
13 cannot divide up causation. If that is true, then a statement to that effect and the
14 rationale is needed. Please be sure to indicate your opinion as it relates to
15 Mr. Maxham specifically.

16 The *Benson*^[3] court recognized that because period of healing (TD) may have a
17 synergistic effect, it may be speculative to parse out the cause of permanent
18 disability among several injuries with overlapping periods of TD. The court also
19 re-affirmed that all apportionment must be supported by substantial evidence.

20 Please recall under *Almaraz-Guzmann II*^[4] [sic], in determining the whole person
21 impairment (WPI) the physician is allowed to utilize any chapter, table, or method
22 in the AMA guides that most accurately reflects the injured employee's
23 impairment. Creative use of the guides, such as finding additional or alternative
24 impairment analysis from other chapters of the Guides is allowable in order to
25 reach and [sic] fair and accurate whole person impairment. The AMA guides
26 expressly "contemplate that a physician will use his or her judgment, experience,
27 training and skill in assessing WPI."

In *City of Sacramento v. Arthur Cannon*,^[5] the Court of Appeal expanded further
on *Almaraz/Guzman II* holding that "rating by analogy" is not only permissible
but it is within the physician's legislative directive to achieve a fair and accurate
impairment rating. In *Cannon*, the agreed medical examiner determined that the

³ *Benson v Permanente Medical Group* (2007) 72 Cal. Comp. Cases 1620 (Appeals Board en banc).

⁴ *Almaraz v. Environmental Recovery Services / Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), affirmed by *Milpitas Unified School Dist. v. Workers' Comp. Appeals Board* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (modified on other grounds on September 1, 2010).

⁵ *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1].

1 applicant's left foot condition, plantar fasciitis, was equivalent to a limp with
2 arthritis. The court reasoned that there is nothing in the 2004 amendment to
3 section 4660 that precludes finding of impairment based on subjective complaints
4 of pain where no objective abnormalities are found. In addition, the condition
5 need not be extraordinary or complex in order to apply "the four corners of the
6 guide." If you do not use other sections of the guides, please explain how and
7 why you did not. Likewise, if you do not use the "four corners" to achieve a fair
8 and accurate WPI, please explain how and why.

9 Lastly, with the goal of provide [sic] the "most accurate impairment rating,"
10 please consider the impact of the permanent disability on Mr. Maxham's
11 Activities of Daily Living and Functional Limitations. ADL's should include
12 those involving self-care, work, house making and leisure. I am also enclosing
13 the **Residual Functional Capacity Assessment** form, please complete this so that
14 the parties can determine return to work issues as well as the impact of the injury
15 on Mr. Maxham's future earning capacity and/or ability to benefit from vocational
16 rehabilitation.

17 (*Id.*, p. 2-3 [emphasis in original and footnotes added].) On November 23, 2015, applicant's counsel
18 stated that she would be submitting the letter to Dr. Lapins over defendants' objection. (*Id.*, Ex. F.)

19 On December 17, 2015, defendants filed a Declaration of Readiness to Proceed, seeking to
20 resolve issues related to applicant's submission of the advocacy letter to Dr. Lapins without defendants'
21 approval. On May 17, 2016, the parties met for a Mandatory Settlement Conference. (Pre-
22 Trial Conference Statement, May 17, 2016, p. 1.) The parties specified the following issue to be decided:
23 "Whether applicant counsel's letter to Drs. Johnson, Abeliuk and Lapins constitutes 'other information'
24 as contemplated by Labor Code § 4062.3 and 8 CCR § 35." (*Id.*, p. 3.) At the close of the Mandatory
25 Settlement Conference, the WCJ ordered that, "The 3 letters listed under exhibits on page 5 are ordered
26 into evidence. The issue described on page 3 stands submitted for decision." (*Id.*, p. 1.)

27 On June 2, 2016, the WCJ rendered a decision in favor of applicant, finding that the letters to
Doctors Lapins, Abeliuk, and Johnson constituted "communications" under section 4062.3(f), rather than
"information" under section 4062.3(c), and thus did not require defendants' agreement before they were
sent. (Order, p. 1.) Specifically, the WCJ found that section "4062.3(f) controls and when
'communications,' including advocacy letters, are sent to an AME, they need only be served on the
opposing party." (Opinion on Decision, p. 4.).

1 Defendants filed a Petition for Removal seeking review of the Order on June 27, 2016.
2 Defendants contend that applicant's letters "should be classified as 'information' and not merely a
3 'communication' because [they are] 'non-medical record[s] relevant to the determination of the medical
4 issue.'" (Petition, p. 3:19-21.) Specifically, defendants contend that

5 The advocacy letter in this case . . . should be classified as information as opposed
6 to communication because the body of the letter itself included the applicant's
7 **legal position**. The case law and its analysis submitted by applicant's counsel in
8 her advocacy letter is not the mere holding of a workers' compensation landmark
case; instead the information submitted goes above and beyond and has the effect
of directing the AME in forming a favorable report.

9 (*Id.*, p. 5:1-6 [emphasis in original].)

10 The WCJ issued his Report on July 1, 2016. In the Report, the WCJ recommended that
11 defendants' Petition be granted. Specifically, the WCJ stated the following reasons that applicant's
12 letters might be considered "information":

13 Here, the October 14, 2015 letter in dispute notes that a Findings and Award dated
14 November 7, 2012 was attached. Moreover, the letter makes specific reference to
15 medical reports that are part of the current record (Dr. Pattison's November 11,
16 2013 report). Finally, the letter purportedly also attached a Residual Functional
17 Capacity Assessment form sent "so that the parties could determine the return to
work issues as well as the impact of the injury on applicant's future earning
capacity."

18 In addition to the attachments, the letter also contained both legal and factual
19 assertions to which defendant might have wanted to object.

20 (Report, p. 3.) The WCJ concluded that because applicant's letter arguably constituted both a
21 "communication" and "information" under the Labor Code, it likely should not have been served on the
22 AMEs over defendants' objection without an order from the WCJ.⁶ (*Id.*)

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26 ⁶ Rule 35(d) provides that, "If the opposing party objects within 10 days of any non-medical records or information proposed
27 to be sent to an evaluator, those records and that information shall not be provided to the evaluator unless so ordered by a
Workers' Compensation Administrative Law Judge." (Cal. Code Regs., tit. 8, § 35(d).) We do not address applicability of
Rule 35 in this opinion.

II. DISCUSSION

Removal is an extraordinary remedy rarely exercised by the Appeals Board.⁷ (*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, 281, 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*, 136 Cal.App.4th at 600, fn.5; *Kleemann, supra*, 127 Cal.App.4th at 281, fn. 2.) The petitioner must also 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).) Defendants contend that substantial prejudice and irreparable harm will result from the Order because the AMEs in this case will be permitted to consider biased “information” submitted solely by applicant when drafting their reports. Because we are presently unable to determine whether applicant’s counsel provided impermissible “information” to the AMEs, and are thus unable to determine whether defendants will suffer substantial prejudice and irreparable harm, we will grant defendant’s Petition for Removal and return this matter to the trial level for further development of the record.

Preliminarily, this case does not involve a prohibited “ex parte communication” under section 4062.3(g). 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].) Here, it appears undisputed that applicant copied defendant on each of the communications with the AMEs. Because defendants’ counsel was copied on all communications with the AMEs, those communications cannot be said to be “ex parte.”

⁷ The Order constituted an evidentiary decision determining whether applicant’s advocacy letters constituted a “communication” or “information” pursuant to section 4062.3. It is not a “final” order because it does not determine a substantive question or right. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180.) As such, removal rather than reconsideration is the proper avenue for defendant to seek review of the Order. (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (Gaona) (2016) 5 Cal.App.5th 658, 662.)

1 Instead, this case addresses whether applicant violated section 4062.3(c)'s requirement that the
2 parties agree on what "information" is to be provided to an AME. Sections 4062.3(a) – (f) govern the
3 procedures applicable to "information," "communication," and medical evaluators. These sections
4 provide as follows:

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

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

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

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

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

20 (d) In any formal medical evaluation, the agreed or qualified medical evaluator
21 shall identify the following:

22 (1) All information received from the parties.

23 (2) All information reviewed in preparation of the report.

24 (3) All information relied upon in the formulation of his or her opinion.

25 (e) All communications with a qualified medical evaluator selected from a panel
26 before a medical evaluation shall be in writing and shall be served on the
27 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.

 (f) **Communication with an agreed medical evaluator shall be in writing, and**
shall be served on the opposing party when sent to the agreed medical
evaluator. Oral or written communications with physician staff or, as applicable,
with the agreed medical evaluator, relative to nonsubstantial matters such as the
scheduling of appointments, missed appointments, the furnishing of records and
reports, and the availability of the report, do not constitute ex parte
communications in violation of this section unless the appeals board has made a
specific finding of an impermissible ex parte communication.

1 (Lab. Code, § 4062.3 [emphasis added].) Pursuant to the above provisions, the Code requires the parties’
2 agreement before any “information” is provided to an AME. (Lab. Code, § 4062.3(c).) In contrast, when
3 a party wishes to send a “communication” to an AME, it is necessary only to serve the opposing party
4 with that communication. Obtaining the opposing party’s consent regarding a “communication” with an
5 AME is not necessary. (Lab. Code, § 4062.3(f).)

6 Because of the tension between these provisions, it is important to delineate when documents and
7 other materials provided to an AME constitute “information” rather than “communication.” As with any
8 question of statutory interpretation, we begin with the language of the statute. (*Horwich v. Superior*
9 *Court* (1999) 21 Cal.4th 272, 276, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898-899.) Section
10 4062.3(a) defines “information” as follows:

11 “(1) Records prepared or maintained by the employee’s treating physician or physicians[,]” or

12 “(2) Medical and nonmedical records relevant to determination of the medical issue.”

13 (Lab. Code, § 4062.3(a).) “Where the same word is used in more than one place in a legislative
14 enactment, we presume the same meaning was intended in each instance.” (*Castro v. Sacramento*
15 *County Fire Prot. Dist.* (1996) 47 Cal.App.4th 927, 932, citing *Cano v. State Bd. of Control* (1992)
16 7 Cal. App.4th 1162, 1165.) We accordingly conclude that the term “information” as used throughout
17 section 4062.3 means either (1) records prepared or maintained by the employee’s treating physician or
18 physicians, or (2) medical and nonmedical records relevant to determination of the medical issue.⁸

19 At first blush, applicant’s advocacy letters to the AMEs should constitute “communication”
20 because they do not fall into one of the two categories of records that characterize “information,” as that
21 term is defined in section 4062.3(a). We have previously explained, however, that “[a] given piece of
22 correspondence or a letter to a party, under certain circumstances, may be more than simply an act of
23 ‘communication.’ It may also be ‘information.’” (See *Nehdar v. Washington Mutual* (2013) 2013 Cal.

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25 ⁸ We note that section 4062.3(a) defines “information” in the context of records to be provided “to the qualified medical
26 evaluator selected from a panel,” otherwise known as a panel QME. (Lab. Code, § 4062.3(a).) The term “information” is
27 then used throughout section 4062.3 in the context of records provided to either a QME or an AME. (See, e.g., Lab Code,
§§ 4062(b), (c), (d).) Because “information” should be given the same meaning throughout section 4062.3 (see *Castro, supra*,
47 Cal. App.4th at 932), we presume that “information” should have the same meaning in each use throughout section 4062.3,
regardless of whether it references records provided to a QME or an AME.

1 Wrk. Comp. PD LEXIS 221, at p. 21.) We have accordingly held that *sub rosa* video provided to a QME
2 constituted “information” because, “Information, such as a film or video is separate from a
3 communication and its enclosure with a communication will not transform it into a communication.”
4 (See *Wan v. Community Health Network (San Francisco Gen. Hosp.)* (2015) 2015 Cal. Wrk. Comp. P.D.
5 LEXIS 243, p. 6.) We have similarly held that a vocational report provided to an AME at a deposition
6 could not be a “communication” because it “also contained ‘information’ as defined in section
7 4062.3(a)(2).” (See *Trapero v. Northern American Pneumatics* (2012) 2012 Cal. Wrk. Comp. P.D.
8 LEXIS 541, p. 9.) In these cases, the salient question was whether the “communication” at issue
9 contained, referenced, or enclosed “information,” as that term is defined in section 4062.3(a). We thus
10 conclude that a “communication” under section 4062.3 can become “information” if that correspondence
11 or letter contains, references, or encloses (1) records prepared or maintained by the employee’s treating
12 physician or physicians, or (2) medical and nonmedical records relevant to determination of the medical
13 issue.

14 In the event a piece of correspondence is deemed to be “information” under the above analysis,
15 the next step is to determine whether providing that “information” to the AME was prohibited. Section
16 4062.3(c) establishes that, when an AME is selected, “the parties shall agree on what information is to be
17 provided to the agreed medical evaluator.” (Lab. Code, § 4062.3(c).) Accordingly, if the
18 correspondence contains, references, or encloses (1) records prepared or maintained by the employee’s
19 treating physician or physicians, or (2) medical and nonmedical records relevant to determination of the
20 medical issue *that the parties previously agreed to provide to the AME*, serving that correspondence on
21 the AME without giving the opposing party an opportunity to object would not violate section 4062.3(c).

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1 Only when the correspondence contains, references, or encloses “information” which the parties have not
2 agreed to provide to the AME does it violate section 4062.3(c).⁹

3 In applying the above analysis to the advocacy letters submitted by applicant in this case, we are
4 unable to presently determine whether applicant’s counsel sent impermissible “information” to the
5 AMEs. As the WCJ notes in the Report, applicant’s October 14, 2015 letter to Dr. Abeliuk states that
6 “Judge Phenix’s Findings and Award dated November 25, 2012 is enclosed, as well as his most recent
7 decisions awarding temporary total disability benefits and the summary of evidence and Minutes of
8 Hearing relating to those two decisions.”¹⁰ (March 25, 2016 Petition for Costs, Ex. A, p. 10.) These
9 records appear to reference both (1) records prepared or maintained by the employee’s treating physician
10 or physicians, and (2) medical and nonmedical records relevant to determination of the medical issue[,]”
11 and thus constitute “information” under section 4062.3. (See, e.g., Minutes of Hearing, October 19,
12 2012, p. 4:1-11 [referencing various depositions taken in the case, each of which constitute “nonmedical
13 records relevant to determination of the medical issue”].) The October 14, 2015 letter to Dr. Abeliuk
14 purportedly enclosed and references these case documents, which themselves appear to reference
15 “information” in this case. We are unable to determine, however, whether the parties previously agreed
16 that this “information” could be provided to Dr. Abeliuk and, for that reason, must return this case to the
17 trial level so that the WCJ can determine in the first instance whether prohibited “information” was
18 provided to the AME.

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21 ⁹ By way of example, consider a situation where a defendant’s counsel drafts an advocacy letter to an AME citing portions of
22 an applicant’s deposition testimony. Because that correspondence references “medical and nonmedical records relevant to
23 determination of the medical issue” (i.e., applicant’s deposition), it constitutes “information” under section 4062.3(c). If the
24 parties previously agreed that applicant’s deposition transcript would be provided to the AME, however, serving the advocacy
25 letter on the AME would not violate section 4062.3(c) because the parties previously agreed that the “information” at issue
26 (i.e., applicant’s deposition testimony) would be provided to the AME. Said differently, litigants are entitled to reference
27 (1) records prepared or maintained by the employee’s treating physician or physicians, and (2) medical and nonmedical
records relevant to determination of the medical issue in advocacy letters if the parties have previously agreed to provide that
referenced “information” to the AME.

¹⁰ We note that the “enclosure” list at the end of the October 14, 2015 letter to Dr. Abeliuk does not indicate that the
referenced documents were actually enclosed with the letter. (March 25, 2016 Petition for Costs, Ex. A, p. 12.) We thus
cannot determine on the present record whether they were actually provided to Dr. Abeliuk.

1 Similarly, as the WCJ notes in the Report, applicant's November 18, 2015 letter to Dr. Lapins
2 states that,

3 Mr. Maxham was evaluated by AME Dr. Thomas Pattison for issues other than
4 AOE/COE. In the doctor's report dated November 11, 2013, he found that in
5 addition to the Guillain-Barré syndrome, its associated diagnosis and sequelae
6 include the following: hand contractures requiring multiple hand surgeries,
7 neuropathic pain syndrome, possible cognitive impairment/fatigue, tracheostomy-
8 healed, and bladder issues and major depression, recurrent, with anger control
9 issues.

10 (March 25, 2016 Petition for Costs, Ex. D, p. 4.) Dr. Pattison's report certainly constitutes a medical
11 record relevant to determination of the medical issue in this case, and is thus "information." The
12 November 18, 2015 letter to Dr. Lapins references this "information," and thus could itself be considered
13 "information" as well. Although the WCJ acknowledges that Dr. Pattison's report is "part of the current
14 record" (Report, p. 3), we are unable to determine whether the parties previously agreed that this
15 "information" (i.e., Dr. Pattison's November 11, 2013 report) would be provided to Dr. Lapins. We will
16 thus return this case to the WCJ to make that determination.¹¹

17 We disagree with defendants, however, that applicant's letters to the AMEs constitute
18 "information" simply because the "body of the letter itself included the applicant's **legal position.**"
19 (Petition, p. 5:2-3 [emphasis in original].) As noted above, defendants objected to large portions of
20 applicant's November 18, 2015 letter to Dr. Lapins on the basis that it made arguments regarding the
21 impact of various legal decisions on the determinations to be made in this case. Ordinarily, however,
22 advocacy letters discussing legal positions or decisions would not constitute "information" as defined by
23 section 4062.3(a). Our review of defendant's proposed revisions to the November 18, 2015 letter to Dr.
24 Lapins does not reveal that the objected to portions contain or reference any (1) records prepared or
25 maintained by the employee's treating physician or physicians, or (2) medical and nonmedical records

26 ¹¹ In his Report, the WCJ also raises as a potential issue applicant's purported inclusion of a blank "Residual Functional
27 Capacity Assessment" form with his letter. (Report, p. 3.) We are unable to determine on the present record whether
inclusion of this form would transform the correspondence at issue into "information." We accordingly leave that
determination to be made by the WCJ in the first instance, utilizing the framework adopted in this opinion.

1 relevant to determination of the medical issue. (See March 25, 2016 Petition for Costs, Ex. E, p. 2-3;
2 *supra*, p. 3:6-4:10.) As such, those portions of applicant’s advocacy letter are not objectionable.

3 We recognize that previous panel decisions on this issue may have created confusion regarding
4 the precise delineation between “communication” and “information” and whether engaging in advocacy
5 crosses that line.¹² To the extent that those decisions do not comport with the above analysis of the
6 dividing line between “information” and “communication,” we disagree with them. Despite our previous
7 indications to the contrary, engaging in legitimate “advocacy” does not transform correspondence with a
8 medical examiner from “communication” into “information.”¹³

9 Correspondence engaging in “advocacy” or asserting a “legal or factual position” can, however,
10 cross the line into “information” if it has the effect of disclosing impermissible “information” to the
11 AME without explicitly containing, referencing, or enclosing it. Misrepresentation of case law or legal
12 holdings, engaging in sophistry regarding factual or legal issues, or misrepresentation of actual
13 “information” in a case are three ways in which a party might attempt to convey purported “information”
14 to a medical examiner to which the opposing party has not agreed. The WCJ retains wide discretion in
15 assessing the contents of a parties’ advocacy letters to ensure parties do not serve correspondence which
16 could confuse or misdirect the attention of a medical examiner, even if that “communication” does not
17 expressly contain, reference, or enclose “information.”

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21 ¹² See, e.g., *Nehdar*, *supra*, 2013 Cal. Wrk. Comp. P.D. LEXIS 221, at p. 22 [“A letter can constitute information if the body
22 of the letter itself includes a party’s legal or factual position, or communicates information as to the factual, relevant or
23 operative circumstances of a case.”]; *Ferniza v. Rent A Center* (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 624, at p. 14
24 [“Some communications - those which convey only neutral information, e.g., an unembellished list of issues to be determined,
25 a list of records sent to the evaluator, basic information such as the injured worker’s date of birth or date of injury—are
26 ‘communications’ only, and not ‘information,’ i.e. ‘medical and nonmedical records’ within the meaning of section 4062.3(a).
27 In this case, however, no one disputes that defendant’s position statement crossed the line into advocacy. Because of its
nature as an advocacy letter, this communication constitutes ‘information’ and falls within the prohibition of section
4062.3(b)[.]”].

¹³ After all, parties typically select a medical examiner “because of his or her expertise and neutrality.” (See *Brower v. David Jones Constr.* (2014) 79 Cal. Comp. Cases 550, 556, citing *Power v. Workers’ Comp. Appeals Bd.* (1986) 179 Cal. App. 3d 775, 782 [51 Cal.Comp.Cases 114].) Given a medical examiner’s presumed expertise and neutrality, he or she is well-equipped to evaluate the parties’ reasonable advocacy when formulating an opinion regarding each case.

1 Accordingly, we will rescind the Order and return this matter to the trial level so that the WCJ can
2 reassess applicant's letters and their enclosures to the AMEs under this framework. If the WCJ
3 determines that applicant improperly provided "information" to the AMEs, he has wide discretion in
4 fashioning an appropriate remedy for the violation of section 4062.3(c). Because this case does not
5 involve an improper *ex parte* communication with an AME, removal of that AME may not be warranted.

6 In the Report, the WCJ notes that,

7 In light of the long and difficult medical-legal history of the present claim, it
8 would appear significantly prejudicial to both sides to remove Dr. Abeliuk from
9 the case. Accordingly, the undersigned feels that the parties should meet and
10 confer and attempt to jointly agree on a purpose letter that can be sent to
11 Dr. Abeliuk. Upon agreement on a letter, the parties can request that the AME
consider only that letter and disregard any and all prior advocacy letters
previously sent by either party.

12 (Report, p. 3.) Although we do not endorse any particular remedy in the event the WCJ determines
13 applicant improperly provided "information" to the AMEs, given the circumstances of this case we do
14 not believe that the WCJ's proposal above would be inappropriate.

15 III. CONCLUSION

16 Accordingly, based upon our review of the record, defendants' Petition for Removal, applicant's
17 Answer, the contents of the WCJ's Report, and the relevant statutes and case law, we hold that:

- 18 1. "Information," as that term is used in section 4062.3, constitutes (1) records prepared or
19 maintained by the employee's treating physician or physicians, and/or (2) medical and
20 nonmedical records relevant to determination of the medical issues.
- 21 2. A "communication," as that term is used in section 4062.3, can constitute "information" if
22 it contains, references, or encloses (1) records prepared or maintained by the employee's
23 treating physician or physicians, and/or (2) medical and nonmedical records relevant to
24 determination of the medical issues.

25 We thus grant defendant's Petition for Removal and, as our decision after removal, will rescind
26 the Order and return this matter to the trial level for further proceedings consistent with this opinion.

27 ///

1 For the foregoing reasons,

2 **IT IS HEREBY ORDERED** as the decision of the Workers' Compensation Appeals Board (En
3 Banc) that defendant's Petition for Removal of the Order issued by the workers' compensation
4 administrative law judge on June 2, 2016 is **GRANTED**.

5 **IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation
6 Appeals Board (En Banc) that the Order issued by the workers' compensation administrative law judge
7 on June 2, 2016 is **RESCINDED** and that this matter is hereby **RETURNED** to the trial level for further
8 proceedings consistent with the opinion herein.

9 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

10
11 /s/ Frank M. Brass

12 **FRANK M. BRASS, Commissioner**

13
14 /s/ Deidra E. Lowe

15 **DEIDRA E. LOWE, Commissioner**

16 /s/ Marguerite Sweeney

17 **MARGUERITE SWEENEY, Commissioner**

18 /s/ Katherine A. Zalewski

19 **KATHERINE A. ZALEWSKI, Commissioner**

20 /s/ Jose H. Razo

21 **JOSÉ H. RAZO, Commissioner**

22
23 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

24 **1/23/2017**

25 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED ON THE**
26 **FOLLOWING PAGE AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL**
27 **ADDRESS RECORD.**

SS/aw/abs

SERVICE LIST

**ADELBERG ASSOCIATES MEDICAL GROUP
BRADLEY MAXHAM
CURTIS WINTER
FRAULOB BROWN GOWEN & SNAPP
MASTAGNI HOLSTEDT
STATE COMPENSATION INSURANCE FUND
STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS**