



ALVAREZ V. WCAB (2010) (COURT OF APPEALS, CERTIFIED FOR PUBLICATION), 18 Cal App 4th 860, *Provided by Christopher Philippides of the Stockton office*

In an Appellate Court case certified for publication, the 2nd District has concluded that an *ex parte* communication with a Panel QME, even involving administrative rather than substantive matters, is an expressly prohibited *ex parte* communication pursuant to Labor Code Section 4062.3(f) entitling the opposing party to request a replacement Panel QME.

Factually, Maria Parades was a waitress with the employer who died from intracerebellar hemorrhage and hypertension on September 21, 2005. Her husband filed a workers' compensation claim alleging that the employee's death was a result of her employment. A Panel QME, Dr. Miller, was selected to address causation.

Dr. Miller's deposition was taken in the course of discovery. He made reference to certain documentary evidence but was unable to locate it at the time of the deposition. He indicated that he would review the records sent to him and provide further opinion.

Dr. Miller later telephoned the defense attorney and asked if she could provide another copy of the relevant documents. According to the defense attorney's statements, the telephone conversation lasted less than one minute, and was limited to the issue of the missing documents. The defense attorney immediately corresponded with opposing counsel advising of the brief telephone conversation with the Panel QME and indicating that she would resend the records.

Counsel for the applicant thereupon filed a request for a new Panel QME on the grounds that a prohibited *ex parte* communication had been made, along with a request for penalties and sanctions. The matter proceeded to trial before the WCAB on these issues. The judge declined to order a new Panel, noting that the QME had initiated the call, and that the brief discussion involved non-substantive issues. Counsel for applicant subsequently petitioned for reconsideration, whereupon the Judge's opinion was affirmed by the Appeals Board.

The Appellate Court reversed the Appeals Board's decision and found that the applicant was entitled to a new Panel QME on the grounds that the *ex parte* communication violated Labor Code Section 4062.3(e). The Appellate Court noted that the Labor Code Section specifically prohibited *ex parte* communications with a Panel

QME and that the statutory language was unambiguous and provided no pertinent exceptions. The Appellate Court rejected the trial judge's opinion that the "non-substantive" nature of the communication was a relevant consideration. They noted other instances where the legislature has made exceptions for non-substantive communications, and indicated that if the legislature had meant to do so here they could have.

The Appellate Court also rejected any argument that the lack of prejudice to the opposing party would be a consideration. They felt that a hard and fast rule was required inasmuch as any *ex parte* communication would have the effect of undermining the appearance of impartiality and legitimacy of the judicial process.

The decision is significant in that it is not unusual for parties in litigation to speak with an AME or Panel QME about such non-substantive matters as scheduling, payment for depositions, provision of records, et cetera. The Court's decision makes it clear that any *ex parte* communication whether on the merits of the case, or simply about administrative or procedural matters, is a violation of the prohibition against *ex parte* communications of Labor Code Section 4062.3. As the penalty for such violation may include disqualification of the Panel QME, penalties and sanctions, care must be taken to avoid such communication by counsel, claims examiners and office staff.