

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 **SHIRLEY LAPPI,**

5 *Applicant,*

6
7 *vs.*

8 **THE REGENTS OF THE UNIVERSITY OF**
9 **CALIFORNIA IRVINE; administered by**
10 **SEDGWICK CLAIMS MANAGEMENT**
11 **SERVICES, INC.,**

12 *Defendants.*

Case No. ADJ3256213 (AHM 0147852)

**OPINION AND ORDERS
DISMISSING PETITION
FOR RECONSIDERATION;
GRANTING REMOVAL ON
APPEALS BOARD MOTION
AND DECISION
AFTER REMOVAL**

13 Defendant Sedgwick Claims Management Services, Inc. (defendant) seeks reconsideration of the
14 Findings and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on
15 November 19, 2012. In that F&O, the WCJ found in pertinent part that defendant's privilege log
16 identified documents from its claims file that were not protected by attorney-client privilege and ordered
17 defendant to provide copies of those unprivileged documents to applicant Shirley Lappi (applicant).

18 Defendant contends that the documents were protected by the attorney-client privilege under
19 Evidence Code section 952; that it met its burden to show that the documents were confidential
20 communications within the meaning of Evidence Code section 917 so that the burden shifted to applicant
21 and, that the documents were protected by the work product doctrine under Code of Civil Procedure
22 section 2018.030.

23 We received an answer from applicant. We received a Report and Recommendation (Report)
24 from the WCJ in response to the Petition for Reconsideration, which recommends denial of the petition.

25 We have reviewed the record and considered the allegations of the petition for reconsideration
26 and the answer and the contents of the Report. Based on our review of the record and for the reasons
27 stated below, we will dismiss defendant's petition as a petition for reconsideration and grant removal on

1 our own motion, rescind the F&O, and return the matter to the WCJ for assignment of the issue to a
2 special master.

3 FACTUAL BACKGROUND

4 Applicant was employed by defendant as an administrative assistant and sustained injury on
5 September 22, 2003 to her back and psyche. Applicant also claimed injury to other body parts, including
6 her right knee and urological condition.

7 Applicant sought to depose defendant's claims adjuster Eric Johnson and obtained a minute order
8 on August 30, 2011 that Johnson was to be available for deposition and "produce all non-privileged
9 portions of the claims file." Applicant took Johnson's deposition on December 14, 2011 and defendant
10 produced some claims file documents at that time, but it did not produce any documents created after
11 January 11, 2008, the date that it retained defendant's attorneys.

12 At a subsequent status conference on February 28, 2012, the WCJ ordered defendant to provide a
13 copy of its computer notes identified as "Notepad Detail" to her no later than March 28, 2012 for "in
14 camera review of alleged confidentiality of said notes." Thereafter, the matter would be set for a further
15 status conference "for discussion with counsel re: documents that are / are not privileged."

16 At a status conference on May 1, 2012, the WCJ noted on her minute order that the claims e-mail
17 notes had been returned to defendant's attorney and ordered defendant to "review the claims notes and
18 serve any and all unprivileged email notations" on applicant's attorneys and provide a log "re: any
19 withheld information" and include the dates of the documents.

20 On May 15, 2012, defendant produced a privilege log identifying 205 documents for which they
21 claimed attorney-client privilege. (Exhibit A, Privilege Log.) The privilege log stated that defendant
22 claimed that the identified documents were confidential and subject to the attorney-client privilege and
23 work product doctrine.

24 On May 23, 2012, after review of the privilege log, applicant wrote to defendant and objected to
25 defendant's failure to disclose forty seven of those documents on the grounds that those items were not
26 communications between defendant and defendant's attorneys. (Exhibit B, Letter by Applicant to
27 Defendant, May 23, 2012.)

1 Trial on this discovery issue took place on September 26, 2012. The Minutes of Hearing,
2 Summary of Evidence describe the issue as defendant's assertion of the attorney-client privilege.
3 Defendant's claims supervisor Brenda Calvert testified.

4 The WCJ issued the F&O on November 19, 2012, finding that some of the disputed items were
5 not privileged and some of the items were privileged. The F&O was based on her review of the privilege
6 log (Exhibit A). In her Opinion, she stated that she determined that the communications between claims
7 personnel were not privileged except when they specifically documented or summarized communication
8 that had been made by counsel.

9 Defendant filed its petition for reconsideration on December 13, 2012. It contends that it had
10 established the existence of an attorney-client relationship and that the communications were confidential
11 and that applicant failed to establish that the communications were not confidential. It also asserts that
12 the work product doctrine applied to the communications. Specifically, with respect to the notes, it first
13 alleges that "[d]efendant's witness further confirmed that designated 'action plans' and 'supervisor
14 reviews' included confidential information, and specifically, legal opinions, discussions and advice
15 provided by counsel, as well as the advice provided by counsel during the course of the relationship. All
16 such items that contained legal opinions, and/or advice provided by counsel, were deemed confidential
17 and privileged by [d]efendants." (Petition for Reconsideration, p. 7, lines 3-10.) However, it then
18 contends that communication among its employees was also protected by the attorney-client privilege. It
19 alleges that "[d]efendant's witness established that the client's notes included action plans and
20 supervisory reviews as a means to communicate internally, document significant activity and to advise
21 the claims examiner of further action that should be taken in the case." (Petition for Reconsideration, p.
22 10, lines 17-22.) Finally, it contends that communications to the nurse case manager and to the defense
23 Qualified Medical Examiner were confidential.

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1 DISCUSSION

2 A decision must be based on admitted evidence in the record. (*Hamilton v. Lockheed Corporation*
3 (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc) (*Hamilton*) and must be supported by
4 substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.*
5 (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3
6 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35
7 Cal.Comp.Cases 16].) As required by Labor Code section 5313 and explained in *Hamilton*, the WCJ
8 must refer to the evidence in the opinion on decision and clearly designate the evidence that forms the
9 basis of the decision. (*Hamilton, supra*, at p. 475.)

10 Here, defendant first asserted a blanket privilege for all documents prepared after it retained
11 counsel, and the WCJ briefly reviewed the documents after the status conference on February 28, 2012.
12 It appears from her order of May 1, 2012 that she believed that at least some of the documents were not
13 protected and that she left it to defendant to specifically review the documents and determine which of
14 the documents were actually subject to the attorney-client privilege. Defendant then asserted a privilege
15 as to 205 of the documents, and subsequently, forty seven documents were at issue.

16 If the notes only contain an internal action plan for defendant's claims employees and do not refer
17 to an attorney's communication, they may not be protected by the attorney-client privilege. Moreover, if
18 a note with an action plan does not refer to an attorney's impressions, it is difficult to see how the action
19 plan would fall within the work product doctrine. Unfortunately, it is not clear from the testimony at trial
20 or from the petition whether the notes sought actually summarize or refer to attorney communications.
21 Accordingly, the F&O must be rescinded.

22 However, with respect to whether defendant's petition is appropriate as a petition for
23 reconsideration, we note that reconsideration may only be had of a final order, decision or award. (Lab.
24 Code, §§ 5900, subd. (a), 5902.) An order which does not dispose of the substantive rights or liabilities
25 of those involved in the case is not a final order. (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.*
26 (*Pointer*) (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v.*
27 *Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) Interim

1 procedural orders or orders regarding discovery or evidentiary matters are not final orders. (*Maranian v.*
2 *Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler*
3 (1989) 211 Cal.App.3d 1171, 1180; *Hansen v. Workers' Comp. Appeals Bd.* (1988) 53 Cal.Comp.Cases
4 193 (writ den.); *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (writ den.))
5 Here, the F&O was not a final order, as it concerns evidentiary matters. Thus, we dismiss defendant's
6 petition for reconsideration.

7 Removal is discretionary and is generally employed only as an extraordinary remedy which must
8 be denied absent a showing of substantial prejudice or irreparable harm, or that reconsideration will not
9 be an adequate remedy after issuance of a final order, decision or award. (Lab. Code, § 5310; Cal. Code
10 Regs., tit. 8, § 10843, subd. (a); *Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460
11 (writ den.); *Swedlow, Inc. v. Workers' Comp. Appeals Bd. (Smith)* (1985) 48 Cal.Comp.Cases 476 (writ
12 den.)) Here, we grant removal on our own motion so as to rescind the F&O. However, we believe that
13 the best course is to return the matter to the WCJ so that she may appoint a special master. In that way,
14 the actual substance of the communications can be assessed.

15 The special master is to be jointly selected by the parties or appointed by the WCJ if they are
16 unable to do so, and the fee is to be paid by defendant. The special master is directed to conduct an in
17 camera review of the disputed documents and to provide that report to the parties and to the WCJ. After
18 the special master's report is presented to the WCJ and the parties, any issues they have concerning it
19 should be addressed during further proceedings. Thereafter, the WCJ should issue a new decision.

20 Accordingly, we dismiss defendant's petition for reconsideration, grant removal on Appeals
21 Board motion, rescind the F&O, and return the matter to the WCJ for appointment of a special master.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Order of
3 November 19, 2012 by the workers' compensation administrative law judge is **DISMISSED**.

4 **IT IS FURTHER ORDERED** that on motion of the Workers' Compensation Appeals Board
5 pursuant to Labor Code section 5310, that **REMOVAL** of this matter to the Workers' Compensation
6 Appeals Board is **GRANTED**.

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