WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA AGUILAR, ***Applicant,*** **vs.** **HARRIS RANCH BEEF COMPANY, permissibly self-insured, adjusted by TRISTAR RISK MANAGEMENT,** ***Defendants.***	**Case No. ADJ9664450** **(Fresno District Office)** **OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL**

Applicant seeks removal of the Findings of Fact and Order issued on March 18, 2015[1]. The workers' compensation administrative law judge (WCJ) ordered that defendant could depose applicant on any history of sexual harassment, sexual assault or molestation, but limited defendant's use of the information. Applicant contends that Labor Code section 3208.4 forbids such discovery in this case because defendant has not shown good cause for the discovery[2].

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition for Removal, the answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record we will grant the Petition for Removal, rescind the WCJ's decision, and substitute our own Order limiting discovery to medical records only at this time and allowing defendant to refile its petition upon a showing of good cause.

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[1] The Findings of Fact and Order was reserved on April 7, 2015, but there was no change from the original Findings of Fact and Order, which issued on March 18, 2015

[2] All future references are to the Labor Code unless indicated.

I.

The facts of this case are straight-forward. Applicant is a 30 year old woman who filed a claim of injury to her psyche alleging injury arising from sexual harassment. At deposition, applicant admitted to treating for depression at age 15, but refused to answer questions relating to the treatment. Applicant objected on the grounds that the depression related to a past sexual assault, battery, or harassment and that such discovery was prohibited by section 3208.4. Defendant petitioned for an order compelling the deposition of applicant and compelling applicant to answer questions concerning her past sexual history. Defendant alleged that good cause existed for such discovery because applicant's answers may be relevant to apportionment or causation of applicant's current psyche injury.

II.

Applicant's past sexual history is constitutionally protected by her right to privacy. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841.) Although applicant waived a certain degree of privacy upon filing a claim alleging psyche injury, ". . . the scope of such 'waiver' must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities." (*Britt v. Superior Court of San Diego County* (1978) 20 Cal.3d. 844, 859.) The discovery sought must be directly relevant to the claim and disclosure by applicant must be essential to the fair resolution of the claim. (*Id.*)

In cases alleging sexual assault, harassment, or battery, the court must weigh the competing interests of the parties. Defendant's right to discovery and due process must be balanced with applicant's right to privacy and undue harassment. Section 3208.4 is designed to achieve this balance by prohibiting discovery of past sexual history except upon a showing of good cause.

> In any proceeding under this division involving an injury arising out of alleged conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning sexual conduct of the applicant with any person other than the defendant, whether consensual or nonconsensual or prior or subsequent to the alleged act complained of, shall establish specific facts showing good cause for that discovery on a noticed motion to the appeals board. The motion shall not be made or considered at an ex parte hearing. (Lab. Code, § 3208.4.)

"The requirement of a court order following a showing of good cause is doubtless designed to protect an examinee's privacy interest by preventing an examination from becoming an annoying fishing expedition." (*Vinson*, 43 Cal.3d at 840.)

Defendant argues that good cause exists because applicant's sexual history may be relevant to causation and apportionment issues in the present sexual harassment claim. That argument does not satisfy the requirement of good cause.

> When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information. And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. (*Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 567 (internal citations and quotations omitted).)

Defendant must cite to specific facts showing that the disclosure is directly relevant. (*Id.* at 575.) There are presently no medical exhibits in the record to indicate that applicant's prior sexual history has caused or contributed to her current psyche injury. Defendant has not yet met its burden.

In cases involving sexual harassment, battery, or assault, the WCJ must proceed cautiously in compelling discovery of prior sexual history starting with the least intrusive means possible. Such determinations are made on a case by case basis using the following analysis:

1) Has defendant cited to specific facts showing that discovery of past sexual history is directly relevant? (*Id.*; see also *Vinson supra*, 43 Cal.3d at 843; see also *Britt supra* , 20 Cal.3d at 859.)

2) If yes, does the need for discovery of past sexual history outweigh the need to preserve privacy? (*Id.*)

3) If yes, what is the least intrusive way to provide the requested discovery? (*Id.*; see also *Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 900 (finding that state compelled discovery that violates privacy must be in the least intrusive manner possible); see also *Lantz v. Superior Court* (1994) 28 Cal. App. 4th 1839, 1853-1855 ("[I]f an intrusion on the right of privacy is deemed necessary under the circumstances of a particular case, any such intrusion should be the minimum intrusion necessary to achieve its objective.").)

In this case, defendant seeks to depose applicant on her past sexual history prior to obtaining any evidence that shows such discovery is directly relevant to applicant's present psychological state. Such an invasion upon applicant's right to privacy is not warranted on the present record.

However, we note that our analysis does not end there because section 3208.4 only covers whether defendant is entitled to compel discovery. Section 3208.4 does not shield applicant from having to prove her case. Applicant has the burden of proof to "demonstrate by a preponderance of the evidence that actual events of employment were predominant to *all causes combined* of the psychiatric injury." (Lab. Code, § 3208.3(b)(1).) Section 4663 compels disclosure of past impairments or disabilities upon request. Section 4663 further compels any doctor commenting upon permanent disability to determine what approximate percentage of disability was caused by "other factors both before and subsequent to the industrial injury(.)" The workers' compensation evaluator must be aware of past psychiatric injuries in order to properly address causation and apportionment. (*Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal. Comp. Cases 241, 245-246 (Appeals Board en banc).)

As this is a denied claim, applicant will require a compensability evaluation pursuant to section 4060. Applicant has admitted a history of depression. In order for a medical evaluator's report to constitute substantial medical evidence, applicant will be required to provide a complete medical history to her evaluator, including all prior psychiatric injuries. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 622 (Appeals Board en banc) and *E.L. Yeager Construction v. W.C.A.B. (Gatten)* (2006) 145 Cal. App. 4th 922, 928 [71 Cal. Comp. Cases 1687].)

Furthermore, defendant has a regulatory duty to provide the evaluator with all prior psyche treatment records. (Cal. Code Regs., tit. 8, § 35(a).) The records of applicant's past treatment for depression are relevant to applicant's psychological history, which applicant has put at issue. If applicant continues with her claim, discovery of her prior medical records is proper. (Cal. Code Regs., tit. 8, § 10626.) Additionally, applicant will need the records to meet her burden of proving predominant causation. Finally, the records should provide the doctor(s) with sufficient information to determine whether additional discovery is needed regarding applicant's prior sexual history as relates to causation and/or apportionment.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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; Kleemann, supra.*) Also, the petitioner must 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).) Requiring applicant to testify via deposition, based on this record would subject applicant to irreparable harm that could not otherwise be rectified upon reconsideration. Before compelling such testimony, defendant must show that it is medically relevant, which requires the opinion of a medical evaluator. The medical evaluator can best determine whether additional discovery is needed regarding applicant's history of sexual abuse.

Although applicant will be required to produce records of prior treatment in order to complete the evaluation, we note that applicant can protect her privacy interest by petitioning to place the records or reports generated therefrom under seal. (Cal. Code Regs., tit. 8, § 10754.)

Defendant has not presently met its burden of proof to compel applicant's deposition on questions of past sexual abuse. A deposition may be warranted in the future, but is presently premature. Applicant will be subjected to irreparable harm unless removal is granted. The below discovery order acknowledges applicant's right to privacy, while also acknowledging applicant's burden of proof with regards to causation of her psychological injury.

Accordingly, we grant removal, rescind the Findings of Fact and Order issued on March 18, 2015, by the WCJ and substitute the findings and order below.

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For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Findings of Fact and Order issued on March 18, 2015 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as our decision after removal that the Findings of Fact and Order issued on March 18, 2015 by the WCJ is **RESCINDED** and the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1) Applicant, Patricia Aguilar, filed an application for adjudication of claim alleging that she has sustained industrial injury to stress and psyche as a result of sexual harassment at the work place. Defendant timely denied the claim.

2) Defendant has not presently shown good cause to depose applicant on her past history of sexual battery, assault, or harassment.

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ORDER

A) Defendant is entitled to discover and applicant shall identify in writing all locations of treatment to her psyche, including hospitals, physicians, pharmacies, counselors etc. so that those records may be subpoenaed and presented to a psychiatric medical legal evaluator.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

MARGUERITE SWEENEY

RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 05 2015

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

PATRICIA AGUILAR
TAFOYA & ASSOCIATES INC.
YRULEGUI & ROBERTS

EDL/sry

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

WCAB CASE NO: ADJ9664450

Patricia Aguilar,	**vs.**	**Harris Ranch Beef Company, PSI, Adjusted by Tristar-Risk Management,**

WORKERS'S COMPENSATION JUDGE: THOMAS J. HESLIN
DATE OF INJURY: 5/12/2012 - 2/10/2015

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I
INTRODUCTION

Applicant has filed a timely and verified Petition for Removal from the Findings of Fact and Order of March 18, 2015 which was served on March 20, 2015. To date defendant has not filed an Answer.

It is noted that applicant, in its Petition for Removal and in a separate letter dated April 2, 2015 advised that they had not received page two of the March 18, 2015 Findings of Fact and Order. That oversight was corrected and all parties were served with complete copies of the March 18, 2015 Findings of Fact and Award on April 7, 2015.

II
FACTS

This case arises from an alleged cumulative trauma that asserts applicant was the victim of sexual harassment, on the job, by co-workers. Defendant issued a timely denial.

Defendant scheduled and commenced the deposition of the applicant on December 19, 2014. During the course of the deposition testimony was solicited from the applicant about prior psychiatric issues and need for treatment consisting of medications and psycho-therapy.

When defendant began to explore the cause of the prior psychiatric treatment applicant attorney objected and asserted L.C. §3208.4. The parties discussed the matter between themselves and being unable to resolve the issue, suspended the deposition, and filed a DOR. Hearing was held on March 9, 2015.

At the time of the March 9, 2015 hearing the parties presented their oral arguments.

Applicant asserted that L.C. §3208.4 acts as a total bar against any inquiry and discovery of the sexual history of the alleged victim with anyone other than the alleged attacker.

Defendant asserted that the past history of applicant is open to discovery in that it may lead to apportionment and potentially to an defense against the claimed psychiatric disability, i.e. that any psychiatric issues are all pre-existing the alleged events at work.

After hearing the oral argument and extensive discussions with the parties the matter was submitted for decision.

III
DISCUSSION

In rendering its decision the Court considered the language of L.C. §3208.4 and also considered the discussion of the issue in **Sullivan.** The Court also reviewed and considered the language in E.C. §§783, 350 & 352.

While the Court understands that this is a sensitive issue and that the legislature intended to extend protections to victims and alleged victims of sexual assault, the Court interpreters the respective statutes as intending to prevent the "bashing" and "character assassination" of the victims and alleged victims of sexual assault and harassment. Essentially the victim cannot be portrayed as "looking for it" or "inviting it".

In this case, the Court crafted its order to protect applicant from such "bashing" while preserving defendant's right to pursue appropriate discovery that may well lead to evidence of pre-existing disability that is subject to apportionment under L.C. §§4663 & 4664.

It is long standing case law, in California, that the employer is only responsible for that permanent disability that is directly attributable to the injuries that occur on their job.

If one were to accept applicant's interpretation of L.C. §3208.4 then the entire concept of apportionment and L.C. §4663 & 4664 are meaningless.

Applicant's interpretation of L.C. §3208.4 would forever close discovery before it begins and would mean that employers are liable for all disability that arises from sexual assault or harassment on the job regardless of the employees past disability and need for treatment.

The Court also disagrees with defendant's argument that discovery should be broad enough to develop an AOE/COE defense. Defendant is essentially arguing that their worksite was a passive stage upon which an already disabled employee misconceived the actions of co-workers and that by developing a history of past sexual assault and or molestation that defendant can then present a case that would defeat any claim of sexual assault or harassment on the job.

The Court interpreters L.C. §3208.4 to have been crafted to prevent such an argument. The language of L.C. §3208.4 specifically forbids the use of a victim's or alleged victim's past sexual conduct or interaction with anyone other than the accused in arguing that the events complained of did not occur.

In the Court's interpretation of L.C. §3208.4 the development of the record as to apportionment is allowed. The use of past sexual conduct or interactions cannot be used to disprove the events complained of.

The Court crafted its order to allow discovery of applicant's past psychiatric history, including the discovery of past sexual assault or molestation in that apportionment is allowed and appropriate under L.C. §§4663 & 4664. If applicant has a pre-existing psychiatric disability or disorder that contributes to her permanent disability then defendant is not liable for that pre-existing disability.

It is also important that the treating as well as the QME or AME be aware of any past history so that treatment recommendations can be properly crafted to address the needs of the patient/applicant.

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STATE OF CALIFORNIA
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IV
RECOMMENDATION

It is recommended that the Petition for Removal be denied.

Dated: April 15, 2015

Respectfully submitted,

THOMAS J. HESLIN
Workers' Compensation
Administrative Law Judge

Served on parties as shown on
Official Address Record.
By: C. Cook 04/17/2015