WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHARON BELISLE HUNTER , *Applicant,* **vs.** **OROVILLE ELEMENTARY SCHOOL and its servicing facility, BROADSPIRE, for CALIFORNIA COMPENSATION INSURANCE COMPANY, in liquidation,** *Defendants.*	**Case No. ADJ2099754 (RDG 0086466)** **OPINION AND ORDER DENYING PETITION FOR REMOVAL**

Applicant, who is not represented by an attorney, has filed a timely, unverified[1] Petition for Removal, requesting that the Appeals Board rescind the Order Compelling Applicant to Attend Deposition and Suspending Proceedings dated June 6, 2014, wherein the workers' compensation administrative law judge (WCJ) ordered her to appear for a deposition to be taken by defendant California Insurance Guarantee Association (CIGA) on November 13, 2014. Applicant contends that she sustained an industrial injury on March 28, 1996, that she received a stipulated Award including future medical treatment, that she has no new claims open, and that defendant has not shown good cause to take her deposition. Defendant has filed an answer.

For the reasons set forth by the WCJ in his Report and Recommendation, which we adopt and incorporate herein, we deny the petition.

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[1] In *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (significant panel decision), the panel stated: "[U]nder some circumstances (e.g., where the petitioner is a proper applicant or a pro per defendant . . .), we *may* elect not to dismiss an unverified petition" (65 Cal.Comp.Cases at 1427, fn. 3 (emphasis in original)).

Moreover, 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.*) The petitioner also 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).)

Here, petitioner has not met these standards. The fact that defendant *might* ask questions that violate applicant's right to privacy is at best speculative. If applicant believes that a question violates her right to privacy, she can refuse to answer unless ordered to do so by the WCJ. Also, applicant's injury occurred eighteen years ago and was settled by stipulation sixteen years ago. We do not know whether applicant is receiving medical treatment for that injury. Her petition appears to object only to that part of the Order that requires her to submit to deposition. If her right to medical treatment is in fact suspended, her right to contest that suspension before the WCJ will be an adequate remedy. Neither of these contingencies rises to the level of substantial prejudice or irreparable harm.

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For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

KATHERINE ZALEWSKI

I DISSENT. (See Attached Dissenting Opinion.)

DEPUTY

NEIL P. SULLIVAN

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 11 2014

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

FLOYD, SKEREN & KELLY
SHARON BELISLE HUNTER

MR/ara

DISSENTING OPINION OF DEPUTY COMMISSIONER SULLIVAN

I dissent. I would grant applicant's petition for removal and rescind the WCJ's June 9, 2014 order, both to the extent that it directs applicant to attend a deposition and to the extent that it precludes her from commencing or maintaining proceedings before the WCAB until she does so.

This is a case in which applicant sustained a *1996* injury with a stipulated Award that, among other things, included future medical treatment.[2] Defendant is now seeking to compel applicant's deposition. However, I would conclude that defendant is *not* automatically entitled to take applicant's deposition simply because it wants to do so. Instead, defendant must make *some* showing that the deposition is "relevant," i.e., that the deposition is reasonably calculated to lead to the discovery of admissible evidence.[3] It has not even come close to making any such showing here.

Labor Code section 5710(a) provides that the WCAB may cause the deposition of witnesses "to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure."

Under the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.), the scope of permissible discovery is very broad. A party who seeks to compel a witness to answer non-privileged questions at an oral deposition is not required to show "good cause." (*Snyder v. Superior Court* (1970) 9 Cal.App.3d 579, 585-586.) Instead, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010; see also, e.g., *John B. v.*

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[2] The stipulated Award, which issued in 1998, found that applicant sustained a March 28, 1996 head injury while employed as an instructional aide by the Oroville Elementary School District, the insured of California Compensation Insurance Company (CalComp). In the stipulations, the parties agreed that the injury caused 26.75% permanent disability and a need for medical treatment. No temporary disability was awarded. After the Award, CalComp became insolvent and the California Insurance Guarantee Association (CIGA) is now handling CalComp's covered claims.

[3] In his Report and Recommendation Re: Petition for Removal, the WCJ indicates he ordered applicant to attend a deposition because "[a]pplicant has not presented any reason why she should not be deposed." This is the wrong legal standard.

Superior Court (2006) 38 Cal.4th 1177, 1206; *LA Unified Sch. Dist. v. Trustees of the So. California IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 627-628.) Furthermore:

> "[I]n accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery. Evidence is relevant for discovery purposes 'if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement.' Evidence that is relevant for purposes of discovery need not be admissible; it will be relevant, and hence discoverable, if it might reasonably lead to other, admissible evidence." (*John B., supra,* 38 Cal.4th at p. 1206 [internal citations and quotation marks omitted].)

Therefore, even though a party seeking to compel discovery in a pending case need not show "good cause," it is nevertheless required to show that the discovery is reasonably calculated to lead to evidence that is "relevant" for discovery purposes. For example, in the context of the workers' compensation case with an open award of further medical treatment, the defendant must show that the discovery might reasonably assist it in evaluating its liability for treatment.

Defendant has utterly failed to make any such showing here. Its motion to compel merely indicates that it had set applicant's depositions on two occasions and that applicant failed to attend. Neither the motion nor its attachments even attempts to explain *why* defendant set applicant's deposition in the first place. Defendant's response to applicant's petition for removal does little to rectify this. Defendant appends a letter to its response stating, in pertinent part:

> "We need to obtain from you information regarding the work injuries you had after [your] 1996 injury claim against my client. Obtaining this information will not directly affect your workers' compensation claim, or your right to further medical benefits, including treatment.
>
> "However, this information is necessary, for us to determine, from a legal standpoint, exactly which insurance company should bear responsibility for providing those benefits, in particular medical treatment."

Applicant's petition alleges that the only claim she ever filed with the Oroville Elementary School District is the March 28, 1996 injury claim. Moreover, the letter appended to defendant's response does not allege what "work injuries," if any, applicant may have had "after [her] 1996 injury claim."

Furthermore, applicant's permanent disability indemnity (PD) has long since been paid out and she never received any temporary disability indemnity (TD). Therefore, even assuming that she may have sustained *some* new and different industrial injury since 1996 that is not now barred by the statute limitations, there is no apparent basis for CIGA to seek reimbursement or contribution for PD or TD. Certainly, CIGA has not suggested any basis for concluding that taking applicant's deposition is reasonably calculated to lead to relevant evidence regarding a potential petition for reimbursement or contribution regarding PD or TD that somehow relates back to applicant's now 18-year-old claim.

Of course, it is *conceivable* that CIGA might have a basis for seeking contribution, reimbursement, or a change of administrator regarding medical treatment. And I recognize that "contrary to popular belief, fishing expeditions are permissible in some cases." (*Cruz v. Superior Court* (2004) 121 Cal.App.4th 646, 653-654; *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 712, fn. 8.) Nevertheless, "as with a fishing license" there are limits to permissible discovery. (*Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1387.) While a rod and reel may be permitted, gill nets are not. Therefore, I would conclude that defendant cannot compel applicant to subject herself to deposition unless it makes at least *some* showing that she has sustained or has claimed to have sustained a subsequent industrial injury involving the same or related body parts, or that it has some reasonable basis to conclude she may have.

The majority also takes the position that applicant has failed to demonstrate that the order allowing the taking of her deposition, and suspending her right to begin or maintain proceedings until she does so, results in significant prejudice or irreparable harm and that she has failed to demonstrate that reconsideration will not be an adequate remedy if a final order adverse to her ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).) I disagree.

First, I believe that an order directing the taking of an injured employee's deposition, where absolutely no basis for taking the deposition has been shown, causes significant prejudice and irreparable harm per se. This is particularly true where, as here, the injured employee is currently unrepresented. Defendant's motion to compel applicant to attend the deposition does not limit what questions it might ask, nor does the WCJ's order compelling applicant to attend. Moreover, as discussed above, once a

deposition is permitted, the scope of questioning at the deposition is very broad. Accordingly, there is little if anything to restrain a defendant from asking applicant a whole range of questions, some of which might infringe on her privacy.

Second, under the circumstances of this case, I would conclude that a petition for reconsideration will not be an adequate remedy. Again, this is a *1996* injury that was the subject of a *1998* stipulated Award. There are no pending issues from which a "final" decision subject to reconsideration might issue. At most, as discussed above, CIGA might *conceivably* have a basis for seeking contribution, reimbursement, or a change of administrator regarding medical treatment. However, if such an order ultimately issues, applicant herself would not be aggrieved by such an order and she would not have a basis for seeking reconsideration.

Beyond all this, however, the majority neglects to recognize that the WCJ's order not only compels applicant to attend a deposition, but it also suspends her rights to begin or maintain proceedings for the collection of compensation until the deposition is taken. No legal authority exists to suspend proceedings for failure to appear at a deposition. (*Murray v. Intuit, Inc.* (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 389 (Appeals Board panel decision); *Hudson v. CNA Ins. Co.* (1993) 21 Cal. Workers' Comp. Rptr. 208 (Appeals Board panel decision).) Labor Code section 4053 applies only where an employee fails or refuses to submit to a *medical examination*. Moreover, Labor Code section 5710, which governs the taking of depositions, contains no provision allowing an employee's right to begin or maintain proceedings to be suspended for failing to submit to a deposition.[4]

As a final point, section 5710(b) provides that, if a defendant takes the deposition of an injured employee, not only is the employee entitled to all reasonable expenses and lost wages incurred as a result

[4] Although section 5710 allows the WCAB to cause the deposition of witnesses "to be taken in the manner prescribed by law for like depositions in civil actions" (Lab. Code, § 5710(b)), it has been held that "section 5710 simply directs that persons setting depositions must comply with [the Code of Civil Procedure's] 'when,' 'where' and 'how' directives." (*Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 662, fn. 7 [64 Cal.Comp.Cases 624].) Thus, while section 5710 incorporates the deposition *procedures* set forth in the Code of Civil Procedure, it does not necessarily incorporate its *substantive* provisions. (See *Moran v. Bradford Building, Inc.* (1992) 57 Cal.Comp.Cases 273 (Appeals Board en banc).)

of the deposition, but the injured employee is also entitled to a reasonable attorney's fee at the defendant's expense. Accordingly, applicant may wish to obtain legal counsel before attending her deposition, once it is re-set.[5]

For these reasons, I would grant applicant's petition and rescind the WCJ's June 9, 2014 Order in its entirety.

NEIL P. SULLIVAN, Deputy Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 11 2014

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

FLOYD, SKEREN & KELLY
SHARON BELISLE HUNTER

MR/ara

[5] For information on how to obtain an attorney, applicant may wish to consult the Information and Assistance Office (I&A) of the Redding district office of the WCAB. The I&A contact information is as follows: 2115 Civic Center Drive, Room 15, Redding, CA 96001-2740, (530) 225-2047.

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

ADJ2099754

Sharon Hunter (Belisle)

Oroville Elementary School and its Servicing Facility Broadspire, for California Compensation Insurance Company in Liquidation

Workers Compensation Administrative Law Judge

Brigham P. Jones

REPORT AND RECOMMENDATION RE: PETTION FOR REMOVAL

I.

INTRODUCTION

1. Identity of petitioner	:	Petition is applicant
2. Timeliness of petition	:	Petition is timely
Verification	:	Not verified
3. Date of Order Compelling Attendance at Deposition	:	June 6, 2014, This order was in Response to Defendant's Electronic Petition
4. Petitioner's contentions	:	

Applicant contends that the order compelling attendance is not consistent with the law and is factually flawed.

II.

BACKGROUND

Applicant has failed to co-operate with defendant in terms of scheduling her deposition. Moreover, she has wilfully and without lawful excused refused to attend two duly noticed depositions.

III.

DISCUSSION

Parties are encouraged to conduct discovery in a cordial manner. However, this policy is not license to applicant to arbitrarily refuse to submit to a properly noticed deposition.

Applicant has not presented any reason why she should not be deposed.

Her petition is tantamount to a skeletal petition.

Her petition is not verified.

IV.

RECOMMENDATION IN THE ALTERNATIVE

1 .The Honorable Commissioners should deny the Petition for Removal.

2. In the alternative, the Honorable Commissioners may order an amendment to the June 6, 2014 Order to Attend Deposition as follows:

(a) Applicant is ordered to attend the Deposition scheduled for November 13, 2014 at 10 am at Holiday Inn Express, 550 Oro Dam Blvd. East, Oroville, CA 95965, and

(b) In the event applicant fails to attend this Deposition as ordered, her rights to collect Compensation may be suspended.

DATE: 6/26/2014

Brigham P. Jones

Brigham Jones
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

BROADSPIRE CIGA GLENDALE, Email
FLOYD SKEREN SACRAMENTO, Email
SHARON BELISLE HUNTER, US Mail

On: ☐ parties and lien claimants present
X all parties as shown on Official Address Record

ON: 6/26/2014
BY: Ed Brewer