

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

**JAMES SUESS, *Applicant***

**vs.**

**CITY OF POMONA, PSI, administered by  
ADMINSURE, *Defendants***

**Adjudication Numbers: ADJ10799317; ADJ10846030; ADJ10846070  
Pomona District Office**

**OPINION AND ORDER  
GRANTING PETITION  
FOR REMOVAL  
AND DECISION  
AFTER REMOVAL**

Defendant, City of Pomona, seeks removal of the Discovery Order issued by the workers' compensation administrative law judge (WCJ) on October 26, 2021. In the Discovery Order, the WCJ ordered witness, Captain Dennis Cooper of the Pomona Police Department, to answer the proposed questions of applicant's attorney during a subsequent deposition.

Defendant contends that the Discovery Order will cause it significant prejudice or irreparable harm, where the captain's required testimony would result in a breach of the attorney-client privilege and an invasion of the privacy of a police officer.

We received an Answer from applicant, James Suess. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition for Removal (Petition) be denied.

We have considered the allegations of the Petition, the Answer, the contents of the Report, and the record in this matter. For the reasons discussed below, we will grant removal, rescind the WCJ's Discovery Order, and return this matter to the trial level for further proceedings consistent with this opinion.

## RELEVANT FACTS

An initial deposition of Captain Cooper was taken on January 14, 2021. During the deposition, defendant objected to the questions being asked by applicant's attorney and instructed the captain not to answer. Applicant subsequently filed a Motion to Compel the captain to answer, and defendant filed for a Protective Order.

On September 13, 2021, the parties appeared on applicant's Motion to Compel. According to the Minutes of Hearing (MOH) issued that day, applicant was to prepare proposed questions for Captain Cooper to answer during a deposition, and defendant would have 7 days to object to the questions. (MOH, September 13, 2021.) As explained by the WCJ in his Report, on September 13, 2021, applicant submitted its proposed questions (EAMS Doc ID 38202729), however, the WCJ did not admit the proposed questions into evidence. On September 20, 2021, defendant filed its objections to applicant's questions. On October 26, 2021, the WCJ issued the Discovery Order requiring Captain Cooper to answer applicant's questions. The Discovery Order stated, in its entirety:

**IT APPEARING THAT** Applicant has submitted a list, dated September 13, 2021, of 12 questions to be ask[ed] of Captain Dennis Cooper at deposition. After review of the proposed questions, and after review of the two responses from Defendant, and;

**GOOD CAUSE APPEARING;**

**IT IS ORDERED THAT** Captain Dennis Cooper answer the proposed questions at deposition. As this is a discovery Order, all objections regarding admissibility of the questions and answers at trial are deferred.

(Discovery Order, October 26, 2021.)

## DISCUSSION

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) As required by Labor Code section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.) Additionally, decisions by the WCJ and the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d

274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d. 627 [35 Cal.Comp.Cases 16].)

Moreover, all parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] (*Rucker*).) Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Ibid.*) A fair hearing includes, but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158, citing *Kaiser Co. v. Industrial Accident Com.* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Here, we are unable to evaluate the merits of the WCJ's Discovery Order due to the state of the record. The record does not contain any evidence to provide the basis for the WCJ's Order, including applicant's proposed questions for Captain Cooper or the captain's original deposition, and no hearing on applicant's Motion to Compel was held. This raises significant concerns of due process, as neither party has had the opportunity to properly develop the evidentiary record on the issue presented, namely, whether Captain Cooper can be ordered to answer applicant's proposed questions at a deposition. Accordingly, we will grant removal, rescind the WCJ's Discovery Order, and return the matter to the WCJ so that a hearing may be set on applicant's Motion to Compel.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Removal of the Discovery Order issued by the WCJ on October 26, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Discovery Order issued by the WCJ on October 26, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ NATALIE PALUGYAI, COMMISSIONER**



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

**MAY 9, 2023**

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

**JAMES SUESS  
LAW OFFICES OF LINDA LOUISE SCOTT  
LAW OFFICES OF RICHARD S. POWELL**

**AH/cs**

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.  
CS