

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

SHARON ANGELL, *Applicant*

vs.

**SUBSEQUENT INJURIES BENEFITS
TRUST FUND, *Defendants***

**Adjudication Numbers: ADJ4145263 (VEN0120366)
ADJ2903274 (OXN0124883)
Oxnard District Office**

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

Applicant seeks removal of the “Order to Applicant to Produce Documentation of Social Security Disability (SSD) Payments, Enforcing SIBTF’s Notice to Appear and Produce Dated December 11, 2019” (Order), issued on July 8, 2020 by a workers’ compensation administrative law judge (WCJ). The WCJ found that information and documentary evidence from the Social Security Administration (SSA) related to applicant’s Social Security Disability (SSD) benefits are necessary for defendant to establish its right to credit under Labor Code section 4753. The WCJ ordered applicant to produce information and documentary evidence related to her receipt of SSD benefits, including date of entitlement; date of commencement; monthly rates; and total amount paid per year to date.

Applicant contends that the Order causes her irreparable harm and substantial prejudice because it violates her right to due process; allows for impermissible discovery; fails to comply with Code of Civil Procedure (CCP) section 1987; and, compels her to undertake action to satisfy defendant’s burden of proof to establish right to credit under Labor Code¹ section 4753. Applicant also contends that the discovery is not relevant to the issues in this case because SIBTF is not entitled to a section 4753 credit in this case.

¹ All further references are to the Labor Code unless otherwise noted.

Subsequent Injuries Benefits Trust Fund (SIBTF) filed an Answer to applicant's Petition for Removal (Answer). The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the petition be denied.

We have reviewed the record in this case, and considered the allegations of the Petition for Removal, the Answer, and the contents of the Report. We grant the Petition for Removal for the sole purpose of amending the Order, but otherwise affirm the WCJ's decision for the reasons set forth below.

FACTS

Applicant filed an Application for Subsequent Injuries Fund Benefits on September 19, 2016 (SIBTF Application), but did not disclose that she had previously filed for and received SSD benefits. (SIBTF Application, p. 7, ¶ 4.) On May 23, 2018, the SIBTF claim was bifurcated from the primary workers' compensation claim. (Minutes of Hearing, May 23, 2018, Other/Comments.)

A mandatory settlement conference (MSC) was held in the SIBTF case on March 27, 2019. (Pre-Trial Conference Statement, March 27, 2019.) The parties stipulated that applicant did not provide SSD benefits information in the SIBTF Application; had not provided SIBTF with any information or documentary evidence related to SSD benefits received; and, had not provided SIBTF with an executed release for SSA information and documents. (*Id.*, p. 2, ¶ 7.)

In April 2019, SIBTF received applicant's executed release for SSA information and documents. (Post-Trial Brief and Petition to Admit Evidence on Credit, p. 4:5-7.)

On June 12, 2019, the SIBTF claim was submitted for decision, including the issue of whether SIBTF is entitled to a credit related to applicant's receipt of SSD benefits pursuant to section 4753. (Minutes of Hearing and Summary of Evidence, p. 3, Issues, ¶¶ 3-5.)

On June 17, 2019, applicant's counsel filed a supplemental trial brief admitting that applicant "had, in fact, received SSDI benefits in the past for quite some time, which stopped in June 2014." (Supplement to Trial Brief, June 17, 2019, p. 1.)

On August 7, 2019, submission of the SIBTF claim for decision was vacated by the WCJ given applicant's post-submission admission that she received SSD benefits, thereby implicating SIBTF's right to section 4753 credit. (Joint Order Vacating Submission for Decision, August 7, 2019.)

The September 25, 2019 mandatory settlement conference (MSC) was continued to October 23, 2019 “pending receipt of Social Security records.” (Minutes of Hearing, September 25, 2019.) The October 23, 2019 MSC was continued so that SSA records could be “secured within 90 days, absent good cause shown.” (Minutes of Hearing, December 11, 2019, Other/Comments.)

On December 11, 2019, SIBTF served and filed a “Notice to Appear and Produce Documents Re: Credit (WCAB Rule 10532)”² (Notice) stating:

Applicant Sharon Angell by her attorneys of record Ghitterman, Ghitterman & Feld pursuant to WCAB Rule 10532 is hereby given notice to appear on January 6, 2020 at 11:00 am at OD Legal Los Angeles at 355 S. Grand Ave., Suite 1800, Los Angeles, CA 90071 and produce Social Security Administration documentation of Social Security Disability payments to applicant from date of entitlement through present. Applicant may comply with this order by sending documents by U.S. Mail by January 6, 2020. (Notice, p. 1.)

Also on December 11, 2019, the SIBTF claim trial was continued to February 12, 2020. (Minutes of Hearing, December 11, 2019.)

On December 13, 2019, applicant’s counsel sent an e-mail to SIBTF stating that applicant would not be complying the Notice. (December 13, 2019 e-mail from Ghitterman, Ghitterman & Feld to Jesse Rosen (Objection), filed February 10, 2020.) Applicant objected as follows:

As made clear in *Brewer v. IAC* (1964) 29 CCC 3, confirmed in *Hardesty v. McCord* (1976) 41 CCC 111, again in *Lubin v. Berkley East* (1976) 41 CCC 283; and again in *Moran v. Bradford, et al.* (1992) 57 CCC 273, discovery procedures except depositions do not apply to WC claims.

This notice to appear seems to be an SDT to Ms. Angell to produce documents. The WC system does not allow for discovery of this type. Further, CCP 1987 does not apply to the type of discovery request identified in the notice.

And, finally, Ms. Angell has no intention of doing SIBTF's work to diminish her recovery and we do not believe the law requires her to do so... (*Ibid.*)

On February 10, 2020, SIBTF filed a “Petition to Enforce Notice to Appear and Produce Documents Re: Credit (WCAB Rule 10532.) (Labor Code § 4753.)” (Petition to Enforce).

On February 12, 2020, the WCJ issued an “Order to Applicant to Produce Documentation of Social Security Disability (SSD) Payments, Enforcing SIBTG’s Notice to Appear and Produce

² Effective January 1, 2020, WCAB Rule 10532 was renumbered 10642, with no change to the text of the regulation.

Dated December 11, 2019” (First Order). The First Order contained a provision that “written objection filed within 20 days of service hereof shall void this order.” (First Order.)

On February 13, 2020, applicant filed “Applicant’s Objection to 2-12-20 Discovery Order” (Second Objection), claiming that the First Order was issued before applicant received a copy of SIBTF’s Petition to Enforce, incorporating her objections as set forth in the December 13, 2019 Objection, and further, contended that she could not be forced to bear SIBTF’s burden of proof to establish the right to credit pursuant to section 4753. (Second Objection, pp. 1-2.)

On February 18, 2020, applicant sought removal of the First Order, contending “indefinite delay” of her SIBTF claim resulting from the section 4753 credit issue and related SSA information discovery. (Petition for Removal, February 19, 2020.) Applicant’s Petition for Removal was denied for the reasons set forth in the WCJ’s Report and Recommendation (First Report). (Opinion and Order Denying Petition for Removal, February 27, 2020; First Report, February 19, 2020.) The WCJ noted in the First Report as follows:

The attribution of delay to SIBTF (and to the undersigned) ignores the following historical notes:

- 1) Eight months’ delay in requesting proceedings from the SIBTF application of 09/19/2016 until the DOR of 05/15/2017;
- 2) The shelving of the SIBTF issue at petitioner’s request for eight and one-half months from 06/28/2017 to 03/14/2018 to pursue treatment issues;
- 3) Petitioner’s choice to pursue treatment administration issues in lieu of the SIBTF claim through 08/28/2018;
- 4) *Petitioner’s declining to provide a Social Security release through April of 2019;*
- 5) *Petitioner asserting that she did not receive SSA benefits until 06/13/2019, after submission of the SIBTF claim at trial;*
- 6) *Petitioner remaining unwilling to request her own SSA records to expedite discovery.*

The contention that applicant is suffering substantial prejudice due to the “indefinite delay” caused by either defendant or the undersigned WCALJ is not demonstrated by the record herein, and removal is not supported. (*Id.*, pp. 5-6, emphasis added.)

On March 11, 2020, trial of the SIBTF claim was continued to May 13, 2020 because “SIBTF still pursuing SSA info.” (Minutes of Hearing, March 11, 2020, Other/Comments.) Trial was continued twice more. (Minutes of Hearing, May 13, 2020; Minutes of Hearing, July 8, 2020.)

On July 8, 2020, in addition to continuing the trial date, the WCJ issued the Order at issue herein.

Applicant seeks removal of the Order because “it violates her due process rights, allows for impermissible discovery, doesn’t comply with the applicable statute (CCP 1987), and compels her to undertake action to satisfy the defendant’s burden of proof.” (Petition for Removal, p. 1.) Applicant states that she provided SIBTF with an executed release for SSA records in April 2019 even though she was “under no legal obligation to do so...,” but that SIBTF has yet to obtain the records, thereby causing this matter to be “routinely continued” since February 12, 2020. (*Id.*, pp. 2-3.) Applicant contends that she would be severely prejudiced and irreparably harmed should she be forced to “actively pursue discovery to prove an issue in which the opposing party bears the burden of proof,” i.e., the issue of the section 4753 credit. (*Id.*, p. 4.)

Next, applicant contends that the Notice is for the appearance and production of documents at trial, and that the production should be of documents within applicant’s “custody and control;” that the workers’ compensation system does not permit a request for production of documents; and, that the only discovery allowed in workers’ compensation cases are depositions, citing *Brewer v. Industrial Accident Comm’n of California* (1964) 29 Cal.Comp.Cases 3 [1964 Cal.Wrk.Comp. LEXIS 127]), *Hardesty v. Mccord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal.Wrk.Comp. LEXIS 2406]; and, *Lubin v. Berkley East Convalescent Hosp. & Mission Ins. Co.* (1976) 41 Cal.Comp.Cases 283, 287 [1976 Cal. Wrk. Comp. LEXIS 2480].

SIBTF filed a lengthy, verified Answer wherein it contends that *Brewer*, *Hardesty* and *Lubin* actually support the position opposite to applicants, i.e., that the WCAB may order necessary discovery including interrogatories and requests for production of documents; applicant does not dispute that *should* she prevail on her SIBTF claim, SIBTF is entitled to a section 4753 credit; and, that it has requested applicant’s SSD benefits information from the SSA three times without success.

The WCJ recommends denial of the Petition for Removal, reiterating from the First Report, that he believes applicant caused the delay in this case (quoted *supra*), and further clarifies as follows:

Petitioner avers irreparable harm would be occasioned by forcing her to “pursue discovery” on behalf of her opposing party.

The argument is akin to suggesting a party need not answer relevant questions in a deposition nor produce documents germane to a legal dispute in litigation. Releasing the requested records would lead only to demonstrating either that no credit is due SIBTF or fixing the amount of the credit that is statutorily allotted to the Fund. There is no harm at all, let alone an irreparable one.

Petitioner concedes that “Labor Code 4753 allows a credit under appropriate circumstances.” However, she argues (for the first time) that credited payments must be those received on account of a pre-existing disability, and that the Social Security benefits she received came after her subsequent injury.

What is not addressed is how the Court can determine that without the records.

Turning to the Code of Civil Procedure, while 8 Cal. Code of Reg. Section 10532 (now 10642) is cited in the petition filed by SIBT seeking the records, this is not the only legal basis to develop the evidentiary record. Labor Code Section 5701. (Report, p. 4.)

DISCUSSION

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*.) In addition, 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).)

Here, the current issue in dispute is whether SIBTF may seek through discovery information and/or documentary evidence related to applicant’s receipt of SSD benefits. SIBTF seeks this discovery in order to meet its burden of proof to establish a credit pursuant to section 4753, which states in pertinent part:

Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source

whatsoever, for or on account of such preexisting disability or impairment, ... (Lab. Code, § 4753.)³

Applicant admits that she received SSD benefits. Thus, SIBTF seeks information and documentary evidence related to those benefits in order to determine whether it is entitled to a section 4753 credit, and/or the amount of any such credit. Applicant alleges no privilege. Therefore, the discovery sought is proper because it is relevant to an issue in this case, and does not seek privileged information. (See *Union Trust Co. v. Superior Court of San Diego County* (1938) 11 Cal.2d 449, 454; *Garcia v. Arun Enterprises*, 2014 Cal. Wrk. Comp. P.D. LEXIS 567, *15-16; *Padilla v. Los Angeles Metro. Transp. Auth.*, 2010 Cal. Wrk. Comp. P.D. LEXIS 249, *6-7.)

Applicant contends that no party to a workers' compensation proceeding is entitled to request another party produce documents during discovery. We disagree. Section 5710 authorizes depositions in workers' compensation proceedings, including "the attendance of witnesses and the production of records." (Lab. Code, § 5710(a).) Although it is true that SIBTF served a notice to appear and produce pursuant to WCAB Rule 10532 and CCP 1987,⁴ the fact that SIBTF "incorrectly identified the Code of Civil Procedure section that authorizes its notice to produce does not make the notice any less enforceable." (*Cervantes v. Premier Pools & Spas, Liberty Mut. Ins.*, 2013 Cal. Wrk. Comp. P.D. LEXIS 99, *5-6.) The Notice makes clear that SIBTF expected that applicant would appear and produce information and documents pursuant to the Notice. We therefore consider the Notice to be a notice for the deposition of applicant, and that she produce the specified information and documents at the deposition.

Moreover, the panel decisions cited by applicant to support her position actually support affirmation of the Order, and our decision herein. *Brewer, supra*, did not hold that the only discovery procedure allowed in workers' compensation proceedings is the deposition (Lab. Code, § 5710). Instead, the Board held that "absent specific legislation, it is not bound by the discovery

³ We note that this issue has yet to be tried and ruled on, and therefore, we decline to address applicant's contentions related to whether SIBTF is entitled to a section 4753 credit in this case.

⁴ Applicant is correct that former WCAB Rule 10532, which incorporates CCP 1987, addresses service of subpoenas for the appearance at a trial or hearing for non-parties, *or* a notice to a party to appear at the trial or hearing. (Former Cal. Code Regs., tit. 8, § 10532.) CCP 1987 authorizes an accompanying request to produce documents with a notice to appear (but not with a subpoena to appear, which requires a subpoena duces tecum pursuant to CCP 1985). (Code Civ. Proc., §§ 1985, 1987.)

statutes...,” and that it could in its discretion allow or deny the use of interrogatories in a workers’ compensation case.” (*Id.*, *4).

Hardesty, supra, affirmed *Brewer*, and affirmed the WCJ’s order that defendant carrier produce witness statements pursuant to applicant’s subpoena duces tecum.

We think that in most cases the specific provisions of the Labor Code and of our rules relating to discovery will provide adequate tools to the practitioner, and that he should not be encouraged to go beyond them in search of other remedies. Those provisions include provision for the mandatory filing of an answer on a form prescribed by the Board setting out what is admitted and what is in issue (Labor Code § 5500 [Deering’s], Rules § 10480), subpoenaing of witnesses and documents (Labor Code § 130 [Deering’s]), depositions (Labor Code § 5710 [Deering’s]), mandatory service of all medical reports (Rules § 10608), inspection of x-rays (Rules § 10620), inspection of hospital records (Rules § 10626), and the use of independent medical examiners (Labor Code §§ 139 [Deering’s], 4050 [Deering’s], 5700.5). *There are cases, however, and in our opinion this is one of them, where the specific provisions of the Labor Code and of the rules do not provide a remedy sufficiently adequate and convenient to accomplish in the most expeditious way the objectives of liberal pre-trial discovery which we have enumerated above. In those cases, on appropriate motion and on appropriate showing of good cause, the trial judge has, and should exercise the authority conferred on him by § 10345⁵ of our rules to issue such interlocutory orders relating to discovery as he determines are necessary to insure the full and fair adjudication of the matter before him, to expedite litigation and to safeguard against unfair surprise. (Id., at pp. 114-115, emphasis added.)*⁶

⁵ Citation to WCAB Rule 10345 appears to be a typographical error; the citation could be to WCAB Rule 10330 which states: “In any case that has been regularly assigned to a workers’ compensation judge, the workers’ compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case.” (Cal. Code Regs., tit. 8, § 10330.)

⁶ “In exercising his discretion in this area, the trial judge should try to achieve an appropriate balance between the public policy favoring liberality of pre-trial discovery and the specific policy applicable to workers’ compensation cases that they shall be adjudicated expeditiously, inexpensively and without encumbrance of any character. [¶] In the matter before us we think that the trial judge exercised his discretion in an appropriate manner by ordering each party to make available to the other for inspection all statements of witnesses in his possession or which may come into his possession before the time of trial. Good cause for such an order is amply demonstrated by the pleadings filed by applicant’s counsel. The order has the effect of facilitating and reducing the expenses of pre-trial preparation and of eliminating surprise at trial, and it does not entail any undue expense or encumbrance to either party. On the other hand, the alternative suggested by defendant, that each party supply to the other only the names and addresses of the witnesses, does entail unnecessary expense and inconvenience to both parties since it makes it necessary that each party incur the expense of interviewing witnesses who have already been interviewed by the opposing party or his agent, and it does not fully guard against surprise at trial.” (*Ibid.*)

Finally, *Lubin, supra*, affirmed *Hardesty*, concluding that, “We recognize that, in very rare instances, submission of written interrogatories to an opposing party may be the only practical and feasible way of obtaining adequate discovery.” (*Id.*, at p. 287.)

Applicant also contends that the Order violates her right to due process, but fails to articulate the grounds for such a serious allegation. We find no grounds in the record of this action. In fact, the record reflects that applicant had sufficient notice and opportunity to be heard on the issues involved with SIBTF’s attempts to discover information and documentary evidence related to her receipt of SSD benefits. As set forth *supra*, there have been multiple hearings related to this discovery issue, including one prior petition for removal of a nearly identical order.

Next, applicant claims that the Order somehow shifts the burden of proof from SIBTF to applicant to establish whether or not SIBTF is entitled to a credit pursuant to section 4753. We disagree. SIBTF is simply seeking discovery of information and documentary evidence related to applicant’s admitted receipt of SSD benefits in order to meet *its* burden of proof regarding the section 4753 credit. Indeed, as applicant states in the Petition for Removal, SIBTF is entitled to the discovery of information and/or documentary evidence in applicant’s possession, custody, or control. (See Code Civ. Proc., § 2031.010 [“Any party may obtain discovery...by inspecting, copying, testing, or sampling documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control of any other party to the action.”].)

Applicant has therefore failed to state good cause to continue to withhold from SIBTF all relevant and responsive information and documentary evidence related to her receipt of SSD benefits. Consequently, no irreparable harm or severe prejudice inures to applicant as a result of the WCJ’s order that she disclose and produce information and documentary evidence responsive to SIBTF’s lawful and relevant discovery.

Accordingly, we affirm the WCJ’s decision, but grant the Petition for Removal for the sole purpose of amending the Order to clarify the method and scope of discovery ordered by the WCJ. In addition, we encourage applicant to execute and return to SIBTF an updated Social Security Administration Consent for Release of Information (Form SSA-3288), so that defendant may reserve an updated request for records from the SSA relevant to a potential credit under section 4753.

For the foregoing reasons,

IT IS ORDERED that applicant’s Petition for Removal of the “Order to Applicant to Produce Documentation of Social Security Disability Payments, Enforcing SIBTF’s Notice to

Appear and Produce Dated December 11, 2019,” issued on July 8, 2020 by a workers’ compensation administrative law judge, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers’ Compensation Appeals Board that the “Order to Applicant to Produce Documentation of Social Security Disability Payments, Enforcing SIBTF’s Notice to Appear and Produce Dated December 11, 2019,” issued on July 8, 2020 by a workers’ compensation administrative law judge, is **AFFIRMED** except that it is **AMENDED** as follows:

GOOD CAUSE APPEARING, the February 10, 2020 petition filed by the Subsequent Injuries Benefits Trust Fund to enforce its notice to applicant to appear and produce documents relevant to the issue of a potential Labor Code section 4753 credit resulting from applicant’s receipt of Social Security Disability benefits, is **GRANTED**. The petition is granted pursuant to the authority under Labor Code section 5710 to notice a party’s deposition and demand the party’s production of documents at deposition.

IT IS THEREFORE ORDERED that the Subsequent Injuries Benefits Trust Fund serve an updated notice for the deposition of applicant and the production at that deposition of information and documents in applicant’s possession, custody, and/or control related to her receipt of Social Security Disability benefits “for or on account of such preexisting disability or impairment...” (Lab. Code, § 4753), as follows:

- 1.) The date of applicant’s entitlement to such Social Security Disability benefits;
- 2.) the date such Social Security Disability benefits commenced and the date such benefits ended, if applicable;
- 3.) each monthly rate of such Social Security Disability benefits paid applicant through the date of the deposition; and,
- 4.) the total amount of such Social Security Disability benefits paid to applicant through the date of the deposition.

It is found that any relevant information and documentation available through applicant's Social Security Administration on-line account (see <https://www.ssa.gov/myaccount>), are sources of information and documentation within applicant's possession, custody, and/or control.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 2, 2021

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

**GHITTERMAN GHITTERMAN & FELD
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)
SIBTF SACRAMENTO**

AJF/abs

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