

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

JASON LABELLA, *Applicant*

vs.

**MARATHON PETROLEUM;
OLD REPUBLIC INSURANCE COMPANY, ADMINISTERED BY SEDGWICK CMS,
*Defendants***

**Adjudication Number: ADJ15703855
Marina Del Rey District Office**

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

Defendant Marathon Petroleum, insured by Old Republic Insurance Company, administered by Sedgwick CMS (defendant), seeks removal from an October 25, 2022 Order of the Worker's Compensation Administrative Law Judge (WCJ) denying defendant's petitions to compel the attendance of three non-party witnesses at deposition.

Defendant avers that it has the legal right to depose non-party witnesses, and that the WCJ's denial of its petitions to compel non-party witness depositions impairs its discovery rights, resulting in irreparable harm.

Defendant also filed a Request to file a Supplemental Petition, and a Supplemental Petition for Reconsideration on November 15, 2022 (Supplemental Petition). We have granted the request pursuant to WCAB Rule 10964, and have reviewed the Supplemental Petition herein. (Cal. Code Regs., tit. 8, § 10964.)

We have not received an answer from any party. The WCJ has prepared a Report and Recommendation on Petition for Removal (Petition) recommending that we deny the petition.

We have considered the allegations of the Petition for Removal and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons

discussed below, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision.

BACKGROUND

Applicant claims injury in the form of COVID-19-related illness, as well as injury to the digestive, circulatory and nervous systems, while employed on December 6, 2021 as a pipe fitter by defendant.

On October 21, 2022, defendant filed petitions to compel the attendance at deposition of fact witnesses Briauna Hollingsworth, Marshall Mataalii, and Jenna Vasquez. (Petition to Compel Fact Witness Attendance at Deposition, dated October 21, 2022.) The petitions averred applicant and the fact witnesses lived at the same address, and that the depositions were necessary "to obtain details of Mr. LaBella's possible exposure to COVID at home." (*Id.* at 2:7.)

On October 25, 2022, the WCJ issued an order denying all three petitions to compel, stating, "this court is unaware of any basis or jurisdiction for compelling a non-party to appear for a deposition." (Order Denying Petitions to Compel Fact Witness Attendance at a Deposition (Order), dated October 25, 2022.)

Defendant's Petition avers that pursuant to Labor Code section 5701, the WCJ or any party to a workers' compensation proceeding may cause the deposition of witness. (Petition, at 4:16.) Defendant cites to the WCAB panel decision in *Terrones v. Remedy Temp* (August 30, 2010, ADJ423557) [2010 Cal. Wrk. Comp. P.D. LEXIS 451] as authority for the proposition that the WCJ is empowered to compel to the deposition of a non-party witness. (Petition, at 4:25.) Defendant avers a due process right to conduct discovery relevant to applicant's claim of industrial injury, and that the WCJ's order declining to compel the requested depositions results in a denial of that due process right. (*Id.* at 6:1.)

The WCJ's Report initially describes various procedural irregularities in the subpoenas issued by the defendant. (Report, at p. 2.) The report then responds to defendant's citation to the panel decision in *Terrones v. Remedy Temp*, *supra*, 2010 Cal. Wrk. Comp. P.D. LEXIS 451, observing that as a panel decision, the case is not mandatory authority. The Report notes that *Terrones* involved nonparty employees of the defendant, as distinguished from the present matter in which the nonparty deponents are not employees of defendant, and are essentially strangers to the case. (Report, at p. 2.) The WCJ observes that defendant has not established "good cause" for

the deposition of the witnesses beyond their proximity in the same household as applicant, and that defendant may issue a subpoena for the witnesses to testify at trial. (Report, at p. 4.) Accordingly, the WCJ recommends we deny the Petition.

DISCUSSION

Defendant seeks removal from the WCJ's Order denying its petitions to compel the attendance of nonparty witnesses at deposition. Defendant avers that removal is necessary as the order denying its petitions denies it due process and a fair and open hearing. (Petition, at 5:18.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(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, § 10955(a).)

Here, the stated basis for the WCJ's denial of defendant's petitions is a lack of "basis or jurisdiction" for compelling a non-party to appear for a deposition. (Order, dated October 25, 2022.) However, the WCJ's report raises and discusses concerns regarding the procedural validity of the underlying subpoenas, as well as the issue of whether defendant has established good cause for the issuance of a court order compelling nonparty deposition testimony. (Report, at pp. 3-4.) The report concludes that "if defendant can show good service and 'good cause' for taking the nonparties' deposition...this WCJ would consider whether or not an Order Compelling is appropriate." (Report, at p. 5.)

An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall "...make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*).) As required by 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 475.) The purpose of this requirement is to enable "the parties, and

the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton, supra*, at 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, the WCJ’s Order does not substantively address any issue beyond stating that there is no basis or jurisdiction to compel a non-party’s appearance at deposition. The record does not frame the issues, contains no exhibits, testimony or summary of evidence, and does not adequately explicate the basis for the order. To the extent that the WCJ’s report describes multiple other considerations, including whether the underlying subpoenas were procedurally defective, whether appropriate notice to the deponents was effectuated, whether the defendant’s petitions establish good cause for an order compelling, and whether a protective order or other limitations on the scope of the depositions is appropriate, the record is silent on these issues. Accordingly, and pursuant to *Hamilton v. Lockheed Corporation, supra*, 66 Cal.Comp.Cases 473, we will rescind the October 25, 2022 Order, and return this matter to the trial level for further proceedings and for the creation of an adequate record.

Upon the return of this matter to the trial level, we encourage the WCJ and the parties to consider the following. Labor Code section 5710 provides in relevant part:

The appeals board, a workers' compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state 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. To that end the attendance of witnesses and the production of records may be required. Depositions may be taken outside the state before any officer authorized to administer oaths. The appeals board or a workers' compensation judge in any proceeding before the appeals board may cause evidence to be taken in other jurisdictions before the agency authorized to hear workers' compensation matters in those other jurisdictions. (Lab. Code, § 5710(a).)

The statute thus provides that “attendance of *witnesses* and the production of records may be required.” Thus, while the Appeals Board may cause the taking of a deposition of a witness who happens to be an employee of a party, as was the case in *Terrones v. Remedy Temp, supra*, 2010 Cal. Wrk. Comp. P.D. LEXIS 451, the jurisdiction of the Appeals Board in such nonparty cases is not limited to the employees of parties.

Additionally, Code of Civil Procedure § 2025.010 provides that, “[a]ny party may obtain discovery within the scope delimited by Chapter 2 (commencing with Section 2017.010), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by taking in California the oral deposition of any person, including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency.” (Code Civ. Proc., § 2025.010.) Discovery is thus permissible by the taking of depositions in California of any person, irrespective of whether the deponent is a party, or an employee of a party.

In *Hardesty v. Mccord & Holdren* (1976) 41 Cal.Comp.Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406], we observed 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.” In those cases where the Labor Code and our rules do not provide a sufficient remedy, “the trial judge has, and should exercise[,] the authority conferred on him by 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 114.)

Additionally, Code of Civil Procedure section 2025.420 provides the WCJ with broad authority to impose reasonable protective orders regarding the course and scope of the requested discovery. (Cal. Code Civ. Proc., § 2025.420(b).)

With these principles in mind, we will return the matter to the trial level for development of the record, and for the creation of a record that complies with *Hamilton v. Lockheed Corporation, supra*, 66 Cal.Comp.Cases 473, and explicates the issues raised by the petitions to compel the depositions of nonparty witnesses.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Order of October 25, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order of October 25, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 25, 2023

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

**JASON LABELLA
FORD AND WALLACH
LLARENA, MURDOCK, LOPEZ & AZIZAD**

SAR/abs

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