

**DISCOVERY ISSUES IN WORKERS'
COMPENSATION PROCEEDINGS**

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SCOPE OF DISCOVERY GENERALLY

Labor Code section 5307 – WCAB has the power to set reasonable and proper rules of practice and procedure.

Labor Code section 5708 – Hearings and investigations before the WCAB or WCJ's are governed by this division and by the rules of practice and procedure adopted by the Appeals Board . . . The WCAB is not bound by common law or statutory rules of evidence and procedure and may inquire through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.

LIBERAL PRE-TRIAL DISCOVERY

Liberal pre-trial discovery is desirable and beneficial;
Discovery disputes should be brought to a workers' compensation judge for determination on the validity of the claim;
Privileges contained in the Evidence Code are binding on WCAB and apply to those proceedings. However, work product is a limited and not absolute privilege . . . and may be discoverable where the court determines a denial of discovery unfairly prejudices the party seeking discovery or results in an injustice.

See Hardesty v. McCord & Holdren, Inc. (1976) 41 CCC 111 (Board Panel Decision).

PRIVACY CONSIDERATIONS

Privileges contained in Evidence Code : Section 953- (Attorney Client); Section 971 (Spousal); Section 996 (Physician-Patient), et al. apply in workers' compensation proceedings.

Recent case where Writ granted

The Regents of the Univ. of California v. WCAB (Lappi) **ADJ3256213**
Writ granted by Fourth Appellate District, Division 3 – Opinion & Order Granting Removal and Decision After Removal where WCAB allowed a special master to do an *in camera* review of documents to determine if protected by attorney-client privilege or work product doctrine.

WORK PRODUCT/PRIVILEGES/WITNESS STATEMENTS

Coito v. State of California (2012) 54 Cal. 4th 480, 2012 Cal. LEXIS 5823

Supreme Court reversed Court of Appeal and held:

Recorded witness statements are entitled to qualified work product protection.

Absolute protection if Defendant can show the disclosure would reveal its "attorney's impressions, conclusions, opinions, or legal research theories."

If cannot show this, then may be discoverable if Plaintiff can show denial of discovery causes unfair prejudice in preparing their claim or will result in an injustice.

The identity of the witnesses from whom Defendant took statements not automatically absolute or qualified work product. Defendant must show disclosure would reveal attorney's tactics, impressions or evaluation of the case (absolute privilege) or result in taking undue advantage of the attorney's industry or efforts (qualified privilege).

STEPS FOR RECORD DISCOVERY

Labor Code section 130 and 8 *Cal Code of Regs.* section 10530 – allow for SDT of records and subpoenas and SDT shall issue in accordance with the provision of the CCP section 1985 and 1987.5 and Gov. Code section 68097.1.

CCP section 1985 (b) - SDT show good cause for the production of the matters and things described in the subpoena, specify exact matters or things to be produced, set forth in full detail why things are material to the issues involved in the case.

PREVENTING A SDT FOR RECORDS

Is there really a way to do this?

WCAB Rule 10615 – Party (ies) continuing duty to serve each other and lien claimants requesting service with physicians reports received.

*Modified by Labor Code section 4903.6 (d) and WCAB Rule 10608 (c) – Petitions to WCAB/WCJ required to serve medical records on non-physician lien claimants

ALTERNATIVES TO SDT

WCAB Rule 10532 –

Notice to appear or produce in accordance with CCP section 1987 is permissible before the WCAB – *County of Los Angeles v. W.C.A.B. (Hedwall)* (2004) 69 Cal. Comp. Cases 456 (unpublished Court of Appeal decision)

“section 10532 expressly authorizes a notice to appear or produce evidence at Trial. Requiring production through timely service of a written request on opposing counsel in lieu of serving subpoenas avoids costs and is an efficient procedure for producing parties and evidence at Trial . . .”

MEDICAL PRIVACY

Allison v. W.C.A.B. (1999) 72 Cal. 4th 654.

WCJ has authority to use discretion to decide discovery disputes pursuant to Labor Code section 5310. Medical, emotional or mental conditions placed at issue in a workers’ compensation proceeding waives the physician patient privilege as to those body parts or conditions, but it does not waive all medical privacy. The medical information discoverable depends on the nature of the injuries brought before the court. Must frame questions narrowly so as to not impinge on privileged information.

STATUTORY PROTECTIONS FOR MEDICAL PRIVACY

HIPAA – 42 USC section 1320d, et seq.

Enacted in 2003 “to improve the efficiency and effectiveness of health information system by establishing standards and requirements for the electronic transmission of certain health information. *Webb v. Smart Document Solutions, LLC* (1999) 499 F. Supp.1078.

Exceptions to HIPAA:

45 CFR section 164.512 (l) – a covered entity may disclose protected health information necessary to comply with law in relation to workers’ compensation . . . programs . . .”

EXCEPTIONS CONTAINED IN HIPAA

45 CFR section 164.512 (a) – disclosure required by law i.e. Labor Code section 4603.2 (a).

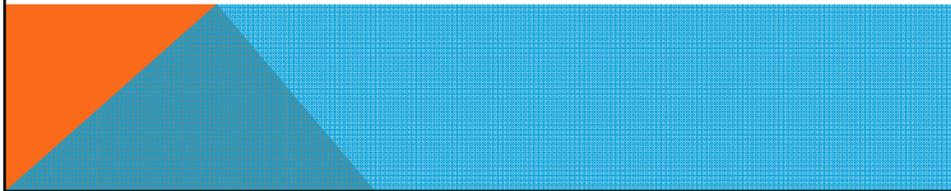
45 CFR section 164.512 (e) – disclosure in a judicial or administrative proceeding in response to an order of a court or administrative tribunal.

45 CFR section 164.502 (b) – still requires a covered entity to make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose.

CA CONFIDENTIALITY OF MEDICAL INFORMATION ACT

Civil Code section 56.10 (b) - Medical provider **must** disclose medical information if compelled by:

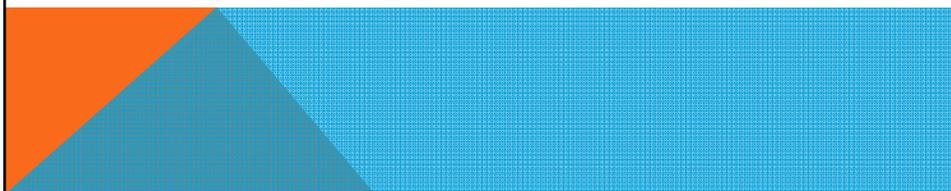
1. Court Order.
2. Administrative Agency/Tribunal (WCAB).
3. Party to a proceeding through use of a SDT.
4. Requested by Patient or their representative.



CA CONFIDENTIALITY OF MEDICAL INFORMATION ACT

Civil Code section 56.10 (c) – Medical provider **may** disclose medical information –

1. To another health care provider for purpose of treatment
2. To an entity responsible for payment of the service;
3. To the employer that is relevant to a legal proceeding where the employee placed their own history or condition or treatment at issue but only to be used/disclosed in that proceeding.



DISCOVERY PETITIONS IN WORKERS' COMPENSATION

1. Motion to Quash SDT
2. Petition for Order Compelling Service of Medical Record and/or Documents (by Parties or Non-Physician Lien Claimants)
3. Motions to Quash Panel QME's or Petition to Assign 2nd Panel or Replacement Panel QME's.
4. Petitions to Compel Deposition and/or Medical Evaluation.

RULES OF PRACTICE & PROCEDURE RE: DISCOVERY PETITIONS

WCAB Rule 10450 – Requirements for all Petitions/Answers filed with WCAB

Verified under penalty of perjury in the manner required for pleadings in courts of record. **10450 (e)**

Served on all parties to the case or others whose rights or liabilities are questioned by the petition or answer. **10450 (f)**

If the above is not done, it is a valid ground for summarily dismissing or denying the Petition or Answer. **10450 (e) and (f)**

WHAT TO ATTACH TO YOUR DISCOVERY PETITION

If it is a Motion to Quash a Subpoena - The subpoena at issue. ☺

If it is a Motion to Quash a QME Panel – The original request for Panel QME; Panel Assignment from Medical Unit and any documentation that supports the basis for the Motion.

If it is a Motion to Compel a QME or AME Evaluation or Deposition – The letter sent notifying Applicant to appear for the Medical Evaluation or Depo; the Affidavit of Non-Appearance or letter from physician; the Panel of QME's assigned by Medical Unit; the AME letter signed by both parties.

DEPOSITIONS – MAY AN EMPLOYER WITNESS ATTEND APPLICANT'S DEPOSITION?

***Yera v. J.C. Penney* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 189 – Board Panel Decision**

WCAB granted removal and rescinded WCJ's order denying Defendant's Motion to Compel Applicant to attend her deposition in the presence of the employer representative (store manager).

Panel held Applicant not excused from attending deposition when a protective order was not requested before the deposition and there was no evidence identifying any right to privacy affected by witnesses attendance at the deposition.

Applicant's feeling that she would be intimidated by the store manager's presence was not sufficient to exclude Defendant's witness from the deposition especially since Applicant was represented by counsel and other remedies available to address any improper behavior that might occur at the deposition.

VOCATIONAL EXPERT TESTIMONY/REPORTS

Labor Code section 5703 (j) – as amended by SB 863 – applicable 1-1-2013 to all dates of injury. (See 2012 Notes after Labor Code section 62.5)

Requires vocational expert evidence to be produced in the form of a written report.

No testimony allowed unless good cause is shown.

Continuance may be granted for rebuttal testimony if the report was not served sufficiently in advance of the close of discovery to permit rebuttal and is admitted into evidence.

CASES INVOLVING VOCATIONAL EXPERT TESTIMONY

Holz v. Gottchalks (Panel Decision) 41 CWCR 41 – WCAB allowed Defendant to have Applicant evaluated by their voc. expert when rebuttal of DFEC adjustment is an issue and applicant retained vocational expert. WCAB Panel referenced LC section 5708 and WCAB Rule 10348 to support this finding.

and

Suarez v. Barrett Business Services (Panel Decision) 2013 Cal. Wrk. Comp. PD LEXIS 129
WCJ found Applicant 100% based on LeBouef finding and WCAB reversed WCJ's finding and found voc. expert opinion not based upon substantial evidence as voc. expert failed to address various factors such as applicant's management skills, etc. . . .

**SERVICE OF MEDICAL RECORDS ON NON-PHYSICIAN LIEN CLAIMANT - 10608
(C) (1) TO (4)**

Non-Physician Lien Claimants:

Cannot issue a SDT or have the employee sign a waiver. If do either, then
quashed by operation of law. **10608 (c) (3)**

Must petition the WCAB/WCJ's to get an order releasing any medical
information.

PETITION REQUIREMENTS – 10608 (C) (5)

1. Identify documents by physician name and/or date(s) of documents;
2. State why they need the documents i.e. reasonably likely to be relevant to their burden of proof.
3. Serve the petition on the Employee, Defendant or their Attorney and the person who has the information;
4. Title document "Petition by Non-Physician Lien Claimant for Medical Information"

****Also needs to comply with Rule 10450 re: Petitions and Answers****

ACTION BY WORKERS' COMPENSATION JUDGE

WCAB Rule 10608 (c) (8)

May take whatever action deemed appropriate including:

Denying petition if inadequate on its face or issuing a NOI to order all, some or none of the medical information sought. **10608 (c)(8)(D)(i)**

Set for a hearing before or after issuing NOI. **10608 (c)(8)(D)(ii);
10608 (c)(8)(A)(iii)**

IF NOI IS ISSUED:

The judge may order the medical information sent to the judge to do an in camera review. If this is done, the medical information sent is not deemed filed or part of the record. **Rule 10608 (c) (8) (B).**

NOI must be done within 15 business days after the filing of the petition. Petitioner and adverse party have 10 days to file a written response to NOI.

Rule 10608 (c) (8) (C).

QUESTIONS??

