

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

ROBERT JONES, *Applicant*

vs.

**RUSSO BROTHERS TRANSPORTATION;
PROTECTIVE INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13967400
Sacramento District Office**

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

Defendant seeks removal of the January 26, 2022 Order Denying Petitions to Quash and Notice of Intent to Impose Sanctions (Order). Therein the workers' compensation administrative law judge (WCJ) denied eight petitions filed by defendant seeking to quash various subpoenas duces tecum directed to third-parties, because the defendant failed to file meet and confer declarations in support of its petitions as required by Code of Civil Procedure section 2025.410(c). The Order further noticed the court's intention to impose monetary sanctions on defendant. Defendant contends the subpoenas should be quashed because they are duplicative, and because defendant received inadequate notice of the subpoenas due to defective service. (Petition for Removal, dated February 28, 2022, at 5:11.)

We have not received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending the Petition be granted.

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and the WCJ's analysis of the petitioner's arguments in the report, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings.

FACTS

On December 21, 2021, applicant issued eight subpoenas duces tecum with a production date of January 10, 2022 for records from various non-party insurance companies. Applicant served the subpoenas on the offices of defense counsel at an incorrect address.

On January 24, 2022, defendant filed eight Motions to Quash and Stay the subpoenas on the grounds defendant had previously subpoenaed the same records on November 17, 2021, rendering the December 21, 2021 subpoenas duplicative and unnecessary (*e.g.* Motion to Quash and Stay Subpoena Duces Tecum CCP 1985.3, 1987.1, dated January 24, 2021 [re State Compensation Insurance Fund], at 2:7).

On January 26, 2022, the WCJ denied all eight petitions, and issued a notice of intent (NIT) to impose monetary sanctions pursuant to Code of Civil Procedure section 2025.410(d) against defendant for failure to attach a meet and confer declaration as required by section 2025.410(c).

On February 8, 2022, defendant filed a Petition for Removal of the Order Denying To Grant [sic] Petitions to Quash and Defendants' Attorney's Objection to Notice of Intent to Issue Sanctions (Petition). Defendant contended that due to defective service of the various subpoenas on its office, defense counsel only received the subpoenas on January 11, 2022. The Petition further avers multiple unsuccessful attempts to contact applicant's counsel and its copy service Gemini Legal Support to resolve the dispute informally. (Petition at 3:18.) The Petition submits that defendant's courses of action were limited to requesting that applicant's counsel withdraw the petitions, lodging an informal objection with applicant's copy service Gemini, or seeking court intervention via motion to quash. (*Id.* at 4:13.) Given the defective service of the subpoenas, defendant submitted that the filing of the petitions to quash was reasonable under the circumstances. Defendant averred its intention in filing the motions to quash "arose from a desire to minimize med-legal costs sustained by the Defendants for unnecessary discovery, as well as preventing unnecessary litigation and disputes arising between the numerous parties involved with these eight identical subpoenas." (*Id.* at 5:3.) With respect to the procedural requirements of a meet and confer declaration, defendant averred:

Defendant's Attorney did not include a meet and confer declaration outlining the aforementioned efforts with the Motions to Quash as they were not based on errors or irregularities in the deposition notice pursuant to Code Civ. Proc., §2025.410, thereby requiring a written objection and meet and confer

declaration. Instead, the Motions to Quash were made by a non-party based on the substantive grounds that they were duplicative and unnecessary pursuant to Code Civ. Proc., § 1985.3(g). At the same time, Defendants' Attorney recognizes that although a meet and confer declaration is not required for a motion to quash a subpoena, it can be helpful to state the attempts to resolve the dispute informally. Accordingly, Defendants' Attorney can seek to include this in the future to facilitate the Court's decisions. (*Id.* at 5:11.)

Defendant also noted that it filed eight separate petitions only after due consideration, in order to facilitate clarity in any ensuing orders should the court grant some petitions but not others. (*Id.* at 6:4.)

On February 17, 2022, the WCJ issued an Order Vacating the Notice of Intent to impose sanctions, noting defendant's prompt response to the NIT and defendant's explanation that the filings were made as a result of inadvertence and/or excusable neglect.

In the Report of February 18, 2022, the WCJ observed that following the order vacating the notice of intent to impose sanctions, the sole remaining issue raised in the Petition was the order denying the various petitions to quash. (Report at p. 2.)

The WCJ noted that WCAB Rule 10640 (formerly rule 10530) provides authority for the issuance of subpoenas under Code of Civil Procedure sections 1985 and 1987.5, and Government Code section 68097.1. However, in 2004 the legislature enacted the Civil Discovery Act, which amended Labor Code section 5710 to provide for deposition of witnesses pursuant to Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. (Report, at p. 3.) The Report observes that while Labor Code section 5710 was amended to reflect the newly enacted statutes governing civil discovery, WCAB Rule 10640 was not updated to reflect these changes, and continued to refer to Code of Civil Procedure sections 1985 and 1987.5. (*Ibid.*) The WCJ further observed that sections 1985 and 1987.5 "have been expressly superseded to the extent that they conflict with the 2004 Civil Discovery Act." The WCJ concluded:

Rule 10640 should be deemed amended to conform with Labor Code § 5710. Parties in litigation are required to meet and confer and to attach a meet and confer declaration to any Petition to Quash a Subpoena. (Code. Civ. Proc., § 2025.410.) Defendant failed to attach any meet and confer declaration to any of its petitions in this case. Accordingly, it was proper to deny the petitions. Failure to meet and confer, and failure to act with substantial justification may also result in the court ordering sanctions. I respectfully recommend that removal be granted in this case and that the Appeals Board address Rule 10640, which appears to be an anachronism. (Report at p. 5.)

DISCUSSION

Labor Code section 5710 provides for the taking of depositions in workers' compensation proceedings. In 2004, AB 3081 amended Section 5710 to provide for "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." (Lab. Code § 5710(a).) Citing to this section, the WCJ denied the defendant's multiple petitions to quash for failure of compliance with Code of Civ. Proc. Section 2025.410(c), which requires a meet and confer declaration under section 2016.040 to accompany any motion to stay.

Defendant's Petition for Removal primarily addresses the NIT re sanctions, but also discusses defendant's rationale for the filing of eight separate petitions. The WCJ later vacated his NIT re sanctions. (Order Vacating Notice of Intent, dated February 17, 2022.) However, the defendant continues to request relief from the order denying the petitions to quash. (Petition, at 6:20.)

Defendant contends its petitions to quash were made "on the substantive grounds that they were duplicative and unnecessary pursuant to Code Civ. Proc., § 1985.3(g)." (Petition, at 5:15.) Defendant contends it was not required to file a meet and confer declaration because its petitions to quash "were not based on errors or irregularities in the deposition notice pursuant to Code Civ. Proc., §2025.410, thereby requiring a written objection and meet and confer declaration." (*Id.*, at 5:11.)

The WCJ's report observes that defendant's reliance on Code of Civil Proc. Section 1985.3(g) arises out of WCAB Rule 10640, which provides:

The Workers' Compensation Appeals Board shall issue subpoenas and subpoenas duces tecum upon request in accordance with the provisions of Code of Civil Procedure sections 1985 and 1987.5 and Government Code section 68097.1. Subpoenas and subpoenas duces tecum shall be on forms prescribed and approved by the Workers' Compensation Appeals Board and shall contain an ADJ number.

The WCJ points out that WCAB Rule 10640 was not updated to reflect the changes made to section 5710, and recommends we grant removal and deem Rule 10640 amended to conform to Labor Code section 5710. (Report, at p. 5.)

However, in our review of the dispute at bar and the concomitant recommendations of the WCJ, we have identified multiple issues related to the application of the Code of Civil Procedure

to workers' compensation discovery procedures that are not addressed in the current record, issues we believe will require further review and analysis.

The legislature has created a “complete system of workers’ compensation...to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability...irrespective of the fault of any party.” (Cal. Const. Art. XIV, § 4.) This “complete system” includes procedures for, *inter alia*, pre-trial discovery, medical-legal costs, and the imposition of sanctions. (See Cal. Code Regs., tit. 8, § 10640 et seq. (Article 10: Subpoenas); § 10670 et seq. (Article 11: Evidence); § 10547 (Deposition Fees); § 10789 (Walk-through Documents); § 10421 (Sanctions); and § 10545 (Petition for Costs).) However, to the extent that these procedures find analogues in the Code of Civil Procedure, it is not clear how conflicts between the statutory provisions of the civil discovery process and our existing discovery rules under Title 8 would be reconciled.

Moreover, while section 5710 references Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure Labor Code, the record does not substantively address how section 5710 would apply to third-party deposition subpoenas, where the deponent has no direct relationship to the dispute. (See Code Civ. Proc. § 2020.410 *et seq.*)

We also observe that under the Code of Civil Procedure, a party may seek to quash a subpoena based on an “error or irregularity” in the deposition notice. (Cal. Code Civ. Proc. § 2025.410(a).) Additionally, a party may file for an order staying the taking of the deposition. (Cal. Code Civ. Proc. § 2025.410(c).) However, it is also the stated public policy of the California workers’ compensation system that, “liberal pre-trial discovery is desirable and beneficial for the purpose of...making available in a simple, convenient and inexpensive way facts which otherwise could not be proved except with great difficulty[,] educating the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlement expediting litigation safeguarding against surprise preventing delay, [and] simplifying and narrowing the issues and expediting and facilitating both pre-trial preparation and trial.”¹ (*Hardesty v. Mccord & Holdren*

¹ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Hardesty* because it considered a similar issue.

(1976) 41 Cal.Comp.Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406] (Appeals Bd. panel decision).) Thus, a party wishing to object to a deposition subpoena must assert a *specific legal right* as the basis for the objection, such as the right to privacy. (See *In re Lifschutz* (1970) 2 Cal.3d 415 [1970 Cal. LEXIS 280]; *Britt v. Superior Court of San Diego County* (1978) 20 Cal.3d 844 [1978 Cal. LEXIS 204]; *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal. App.4th 654 [64 Cal.Comp.Cases 624].) An objection on the grounds that discovery is excessive is not tantamount to the assertion of a legal right, given our rule of liberal pre-trial discovery. However, a party asserting the discovery is excessive or abusive may avail themselves of various remedies offered by WCAB regulations, including the filing of a petition for protective order under WCAB Rule 10510, or by objection to the requested payment for costs under Administrative Director Rule 9980. (Lab. Code § 5307.9; Cal. Code Regs., tit. 8, § 10510; § 10421(b)(6); § 9980 et seq.)

Additionally, section 2025.410 of the Code of Civil Procedure requires both the filing of a motion for order staying the taking of the deposition and quashing the deposition notice, and also a separate meet and confer declaration under section 2016.040. (Cal. Code Civ. Proc. § 2025.410(c); § 2016.040.) However, WCAB Rules provide specific requirements applicable in workers' compensation proceedings relevant to the filing of petitions, their answers, and subsequent request for hearings on evidentiary disputes.² (Cal. Code Regs., tit. 8, § 10410; § 10742.) Additionally, WCAB Rule 10421 and Labor Code section 5813 provide the WCJ with the discretion to levy sanctions on parties whose filings are indisputably without merit. (Cal. Code Regs., tit. 8, § 10421; Lab. Code § 5813.) The record does not substantively discuss how these varying procedures would be reconciled in the event that WCAB Rule 10640 was "deemed conformed" to Labor Code section 5710. (Cal. Code Regs., tit. 8, § 10640; Lab. Code § 5710.)

We note that here, the evidentiary record is largely confined to the pleadings, and does not substantively address the issues identified above. Accordingly, the record must be amplified to assist in the full and complete adjudication of the issues presented. (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*,

² For example, WCAB Rule 10742(c) provides that, "All declarations of readiness to proceed shall state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute before filing the Declaration of Readiness to Proceed, and shall state with specificity on the Declaration of Readiness to Proceed the efforts made to resolve those issues." (Cal. Code Regs., tit. 8, § 10742(c).) Thus, while a meet and confer declaration is required in support of motion for order staying deposition and quashing notice of deposition, WCAB Rules require a similar declaration of the good faith efforts made to resolve the dispute prior to requesting a hearing on the issue.

“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.” (*Id.* 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].)

We acknowledge that the purpose of the meet and confer requirement is “to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order. [Citations.] This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes.” (*Clement v. Alegre* (2009) 177 Cal. App. 4th 1277, 1292 [2009 Cal. App. LEXIS 1568].)

Accordingly, we believe that best practice for a party offering a motion to quash a subpoena is to comply with the meet and confer requirements set forth in Code of Civil Procedure section 2025.410(c). The objecting party should, at minimum, document its “reasonable and good faith attempt at an informal resolution of each issue presented by the motion,” prior to seeking judicial relief, and prior to the expenditure of time and resources by the Workers’ Compensation Appeals Board in consideration of the motion. (Code of Civ. Proc., § 2016.040.) We further observe that the meet and confer process specified in Code of Civ. Proc. § 2025.0410(c) and § 2016.040 serves to advance the “expressly declared social public policy,” that our system of workers’ compensation deliver “substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4; Labor Code § 3201; *Graczyk v. Workers’ Comp. Appeals Bd.* (1986) 184 Cal. App. 3d 997, 1002 [229 Cal. Rptr. 494, 51 Cal.Comp.Cases 408].)

However, as we have previously observed in *Hardesty, supra*, 41 Cal. Comp. Cases 111, “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 § [10330] 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 114.)

Accordingly, and for the reasons described above, we will grant removal and return this matter to trial level for development of the record and further decision by the WCJ. We believe the WCJ to be in the best position to effectuate the “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.” (*Hardesty, supra*, 41 Cal.Comp.Cases 111 at 114.)

We further encourage the parties to seek amicable resolution of their discovery dispute.

However, should amicable resolution not be possible, the record should be developed to address the interaction between Labor Code section 5710, Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure, and the relevant rules of practice and procedure as set forth in Title 8 of the California Code of Regulations, including WCAB Rule 10640.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of January 26, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of January 26, 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/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 17, 2022

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

**ROBERT JONES
EASON & TAMBORNINI
RO & YOU**

SAR/abs

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