WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROGER OSBORNE, ***Applicant***

vs.

JMR TRANSPORTATION, INC.;
BHHC/CYPRESS INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ15747861
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks removal of the September 16, 2022 Discovery Order wherein the Workers' Compensation Administrative Law Judge (WCJ) ordered, inter alia, the production of applicant's psychiatric records.

Applicant's Petition for Removal (Petition) contends that the order violates his right to privacy, and that the records are not relevant to applicant's claim, which does not plead injury to the psyche. (Petition for Removal, dated October 6, 2022, at 2:8).

We have received an Answer from the defendant. The WCJ has prepared a Report and Recommendation on Petition for Removal (Report), which recommends denial of the Petition.

We have considered the allegations of the Petition for Removal, the Answer, and the contents of Report with respect thereto. Based on our review of the record, and for the reasons set forth below, we will grant removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision.

BACKGROUND

Applicant claims injury to the neck, back, thoracic spine, lower extremities, left shoulder, diabetes, circulatory system, respiratory system, sleep apnea, abdomen, ulcers and nerve damage while employed by defendant as a driver/chauffeur from January 1, 2004 to March 15, 2020.

On February 23, 2022 defendant issued a subpoena for the production of records from psychologist Kathleen B. Gates, Ph.D. (Subpoena Duces Tecum directed to Kathleen B. Gates, Ph.D., dated February 23, 2022.)

On March 25, 2022, applicant's counsel issued a letter to Dr. Gates indicating his objection to the production of psychological records pertaining to applicant, because applicant had "not alleged in this claim that [he] suffers from any industrial related [sic] psychiatric or psychological condition." (Letter from Applicant's Counsel, dated March 25, 2022.) Applicant requested that Dr. Gates "not release any records without further Order of the WCAB or advice in writing from Roger Osborne or this office." (*Ibid.*)

On June 21, 2022, the parties set the matter for trial on the sole issue of the "production of records of Dr. Gates/applicant's objection to production of records." (Pre-trial Conference Statement, dated June 21, 2022, at p. 3.)

On September 16, 2022, the WCJ ordered the parties to:

> (1) obtain the records of Dr. Gates; (2) finish applicant's deposition [wherein applicant will] answer question(s) re psyche after applicant's counsel states the objection for the record; (3) file a petition to seal documents (depo transcript sections re: psyche; records re psyche). Comply with CCR 10813. (4) PJ Hjelle will review all such petition to determine if applicant met his burden. (Discovery Order, dated September 16, 2022.)

Applicant avers the WCJ's order issued abrogates his right to privacy without reasonable justification, and that in the absence of a claim of psychiatric injury, good cause is not established for the production of the records. (Petition, at p. 2.)

Defendant's Answer responds that "while it is true that applicant has not alleged a psychiatric condition, the records are clearly relevant. Applicant is alleging heart, hypertension sleep, diabetes and internal conditions that can be affected by stress." (Answer, at p. 3.) Defendant maintains that the records of Dr. Gates may document applicant's "complaints about work." (*Ibid.*)

Defendant further maintains that applicant failed to perfect a formal objection and failed to file a Motion to Quash. (*Ibid.*)

The WCJ's Report notes that the parties were ordered to meet and confer in an effort to reach amicable resolution, and that the proposed order was presented to the parties prior to issuance. (Report at p. 3.) The WCJ further observes that the order reflects the relevant procedures for sealing documents found in WCAB Rule 10813. (Cal. Code Regs., tit. 8, § 10813.) The Report also observes that the order does not actually rule on whether the documents to be produced will be admitted into evidence. (Report, at p. 3.)

DISCUSSION

Applicant argues that the discovery order issued without sufficient explanation as to why applicant's "protected psychiatric [records] are being disclosed in violation of his privacy rights," given the lack of "any relevant nexus between applicant's non-industrial depression and his pled injuries at JRM Transportation." (Petition at 2:8.) Applicant contends:

> No evidence was taken on record showing any relevance to Applicant's psychiatric condition and his industrially alleged injuries. There is no indication of, nor mention from any physician, AME, nor PQME, of a need to inspect Applicant's psychiatric records in order to create a nexus between causation nor apportionment to any of his orthopedic nor internal conditions, especially while AOE/COE has still yet to be determined.
>
> By violating Applicant's HIPPA rights and inspecting his psychiatric records without establishing good cause, the WCJ has issued an Order that will violate Applicant's rights without the issue of psychiatry ever being pied as industrial, creating an unreasonable invasion of his privacy in an effort to allow Defendants to go on a "fishing expedition" through records that are not relevant until psychiatry becomes an issue. (Petition, at 2:13.)

Defendant responds that although applicant has not pleaded psychiatric injury, applicant's five years of psychiatric records may prove relevant to his claimed injuries to the heart, hypertension, sleep, diabetes and internal conditions, which "can be affected by stress." (Answer, at 3:1.) Defendant further contends that because applicant has not perfected his objection (e.g. by filing a Petition to Quash or other formal objection to the subpoena), applicant is precluded from advancing his privacy arguments. (Answer at 2:18; 3:9.)

With respect to defendant's procedural contentions, we observe that applicant's issuance of an objection letter to the physician maintaining applicant's psychiatric records, which was timely served on defense counsel, was sufficient to initiate these proceedings, and provided specific notice to the parties of the nature of applicant's objection. Consequently, we conclude that despite the lack of a formal petition, applicant's objection letter adequately addressed any procedural due process concerns, and that the record reflects no significant prejudice to defendant arising out of the lack of a formal objection. (See *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452–1453 [285 Cal. Rptr. 222, 56 Cal.Comp.Cases 537] ["An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"].)

We further observe that applicant is objecting to the *production* of the records in the first instance, rather than petitioning to have existing records sealed. (Petition, at 2:8.) Thus, applicant is aggrieved to the extent the Discovery Order compels the parties to "obtain the records in question," as a condition precedent to evaluation of the relevance and admissibility of the records. (Discovery Order, dated September 16, 2022, para. 3.) The Petition for Removal thus seeks rescission of the September 16, 2022 Discovery Order, which compels the *production* of applicant's psychiatric records, prior to a contemplated motion to seal those documents. (Petition, at 3:1.)

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 substantial 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 record does not divulge the basis for the WCJ's discovery order compelling the production of applicant's psychiatric records. 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].)

We will therefore grant removal in this matter, rescind the Discovery Order dated September 16, 2022, and return the matter to the trial level for further proceedings.

Although we do not decide the issue here, the WCJ may wish to consider the following discussion of the balancing tests necessary to adjudicate a parties' request to discover constitutionally protected or statutorily privileged information.

The California Constitution provides that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const. art. I, § 1.) California's constitutional right to privacy "extends to…medical records." (E.g., *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198 [45 Cal. Rptr. 3d 316, 137 P.3d 153] (John B.); see also, e.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (Hill).)

Additionally, a patient enjoys a privilege to refuse to disclose any "confidential communication" between himself and a treating physician or psychotherapist pursuant to Evidence Code sections 990 et seq. (physician-patient privilege) and 1010 et seq. (psychotherapist-patient privilege).[1] However, Evidence Code sections 996 and 1016 provide an exception to the general physician-patient and psychotherapist-patient privileges, the "patient-litigant" exception, providing in relevant part that "[there] is no privilege…as to a communication relevant to an issue

[1] While the Appeals Board is generally not bound by common law or statutory rules of evidence and procedure (Labor Code sections 5708, 5709), statutory privilege provisions are applicable in workers' compensation proceedings. (See e.g. *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [84 Cal. Rptr. 2d 915, 64 Cal.Comp.Cases 624]; *Martin v. Workers' Comp. Appeals Bd.* (1997) 59 Cal.App.4th 333 [69 Cal. Rptr. 2d 138, 62 Cal.Comp.Cases 1500]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 (Bd. Panel).) These statutory privilege provisions also extend to discovery, because discovery is permissible only if the request information is "not privileged." (Code Civ. Proc., sec. 2017(a); *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd. (Lizzi/Rhooms)* (1996) 42 Cal.App.4th 1260, 1287 [50 Cal. Rptr. 2d 366, 61 Cal.Comp.Cases 149, 169].)

concerning the condition of the patient if such issue has been tendered by…[the] patient." (Evid. Code §§ 996(a); 1016(a).)

In re Lifschutz (1970) 2 Cal.3d 415 [1970 Cal. LEXIS 280] involved the "patient-litigant" exception to psychotherapist-patient privilege.[2] Therein, the defendant to a personal injury lawsuit sought to compel plaintiff's psychotherapist's answers to deposition questions regarding plaintiff's treatment some ten years prior. Defendant argued that "any communication between the plaintiff and Dr. Lifschutz [had] lost its privileged status because the plaintiff [had] filed a personal injury action in which he claimed recovery for 'mental and emotional distress.'" (*Lifschultz, supra,* at 430-31.) The *Lifschutz* court held, however, that the patient-litigant exception allowed "only a limited inquiry into the confidences of the psychotherapist-patient relationship, compelling disclosure of only those matters directly relevant to the nature of the specific 'emotional or mental' condition which the patient has voluntarily disclosed and tendered in his pleadings or in answer to discovery inquiries." (*Id.* at p. 431.) Furthermore, communications which are not directly related to the mental conditions at issue in an action do not fall within the patient-litigant exception and remain privileged. (*Id.* at p. 435.) The court explained that the patient was "not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depend[ed] upon the nature of the injuries which the patient-litigant himself has brought before the court." (*Ibid.*)

The Supreme Court revisited the balancing test between applicant's privacy rights and defendant's discovery rights in *Britt v. Superior Court* (1978) 20 Cal.3d 844 [574 P.2d 766; 143 Cal. Rptr. 695] (Britt). In *Britt*, plaintiff homeowners sought damages from defendant airport owner for various damages arising out of the operation of a jet aircraft facility, including diminution of property values, personal injuries, and emotional disturbance allegedly caused by the noise, vibrations, air pollution, and smoke. (*Britt*, supra, at 849.) Defendant responded by embarking upon a program of extensive discovery, including deposition inquiries into plaintiffs' memberships in various organizations, political activities, and a "wide-ranging" inquiry into plaintiffs' health history, including their entire medical history. (*Id*. at 850.) Defendant contended, in effect, "that by bringing the instant lawsuit plaintiffs have completely waived their right to associational privacy." (*Id*. at 857.) The decision in *Britt* acknowledged that in a "number of contexts in which evidentiary privileges generally provide a cloak of confidentiality, exceptions to

[2] Evid. Code §§ 990 et seq. and 1010 et seq.

such privileges have been recognized as to information that relates to an issue which has been posited by the party claiming the privilege's protection." This was because "a party cannot both prosecute a lawsuit and at the same time foreclose discovery…which may conceivably relate to the litigation." (*Ibid.*)

However, the court in *Britt* went on to note that the broad inquiry into plaintiffs' health histories would, "effectively deter many psychotherapeutic patients from instituting any general claim for mental suffering and damage out of fear of opening up all past communications to discovery" and "would clearly be an intolerable and overbroad intrusion into the patient's privacy."(*Id*. at 859.) Thus, the scope of a plaintiff's waiver of the right to privacy, "must be construed not as a complete waiver of the privilege but only as a limited waiver…with respect to those mental conditions the patient-litigant has '[disclosed]…by bringing an action in which they are at issue'…." (*Britt, supra,* at 859, citing *In re Lifschutz* (1970) 2 Cal.3d 415, 432 [85 Cal.Rptr. 829, 467 P.2d 557] (*Lifschutz*).)

The court in *Britt* thus reaffirmed its prior holding in *Lifschutz*:

> Under section 1016 disclosure can be compelled only with respect to those mental conditions the patient-litigant has '[disclosed]…by bringing an action in which they are in issue' [citation]; communications which are not directly *relevant* to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be 'relevant' to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court. (*Britt, supra,* at 863-864.)

In *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008 [9 Cal.Rptr.2d 331], the defendant to a personal injury lawsuit sought plaintiff's medical treatment records "from [the] beginning of time to date." (*Id*. at 1012.) In discussing the plaintiff's right of privacy, and specifically whether plaintiff had waived that right by filing suit, the Court of Appeal concluded that, "the filing of a personal injury action seeking damages for pain and suffering does not, ipso facto, place mental condition in issue as part of the claim," and that any waiver must be predicated on "specific averments or reasonable interpretations drawn from the pleading which *clearly place mental condition in issue*." (*Id*. at 1017, emphasis added.)

In *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624], defendant in 1996 sought to compel applicant's disclosure of her general past medical history, including her surgical history prior to 1965. Applicant objected, contending her privacy and patient-physician privilege precluded the disclosure of protected information outside the scope of her carpal tunnel syndrome claim. (*Id*. at 656.) The WCJ ordered applicant to answer her employer's deposition questions on the basis that she waived the patient-physician privilege when she filed a workers' compensation claim. (Id. at 658.)

In reversing the WCJ's order, the *Allison* court based its reasoning on *Britt, Lifschutz*, and *Palay v. Superior Court* (1993) 18 Cal.App.4th 919 [22 Cal. Rptr. 2d 839] (disapproved on other grounds). *Palay* involved a medical malpractice action brought on behalf of a child born prematurely with numerous congenital medical issues. (*Id.* at p. 922-23.) The court held that the "history of events during pregnancy set forth in Mother's prenatal records are a source of relevant information about the crucial period of the infant's gestation, and therefore a proper subject for inquiry." (*Id.* at p. 933-34.) However, the court also explained that defendants had "no cognizable interest in medical records unrelated to Mother's pregnancy, nor should they. Discovery procedures must be utilized that identify and remove documents irrelevant and immaterial to the issue of prenatal care. The scope of methods used must be tailored to avoid disclosure of protected records." (*Id.* at p. 934.) Applying this reasoning, the court in *Allison* reversed the WCJ's discovery order as overbroad, and remanded the matter for further proceedings.

Thus, "in determining whether one has waived the right of privacy by bringing suit, our Supreme Court has noted that although there may be an implicit partial waiver, the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014 [9 Cal.Rptr.2d 331].)

We further observe that, "[t]he burden [of proof] is on the party seeking the constitutionally protected information to establish direct relevance. (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 665 [4 Cal.Rptr.2d 564].)

A showing of good cause for the production of privileged records requires more than speculation that, "in the records requested there could be material which might be relevant to various issues in the action, such as the nature and extent of emotional distress suffered, causation of the accident and petitioner's condition at the time of the accident. Mere speculation as to the

possibility that some portion of the records might be relevant to some substantive issue does not suffice." (*Davis, supra,* 7 Cal.App.4th 1008.) This is because in weighing applicant's rights to doctor-patient privilege, "the privilege is too important to be brushed aside when the mental condition of the plaintiff may be only peripherally involved." (*Id.* at 1017.) Bearing these principles in mind, we will return this matter to the WCJ for further proceedings.

In summary, the September 16, 2022 Discovery Order does not address applicant's objection to the *production* of his psychiatric records, and because the record does not adequately disclose the basis for the WCJ's discovery order, we conclude that applicant will sustain irreparable harm arising out of the disclosure. Accordingly, we will rescind the Discovery Order and return the matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Discovery Order dated September 16, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Discovery Order dated September 16, 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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 18, 2023

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

ROGER OSBORNE
LAW OFFICE OF HOWARD J. WASSERMAN
GOLDMAN, MAGDALIN & KRIKES

SAR/abs

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