

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

**JEANETTE FRANCE, *Applicant***

**vs.**

**LOS ANGELES DEPARTMENT OF WATER & POWER,  
PERMISSIBLY SELF-INSURED, *Defendants***

**Adjudication Number: ADJ10738767  
Pomona District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR REMOVAL**

Applicant has filed a “Motion to Vacate and Set Aside Judgment,” dated January 6, 2022.<sup>1</sup> The motion objects to the Order Quashing Subpoena Duces Tecum (Order) issued by the Workers’ Compensation Administrative Law Judge (WCJ) on October 18, 2022. Applicant contends insufficient time elapsed between the filing of the defendant’s Motion to Quash and the issuance of the corresponding Order, in violation of various sections of the Code of Civil Procedure. The motion is not verified.

We have received an Answer from defendant. The WCJ has filed a Report and Recommendation on Petition for Removal, dated November 10, 2022, recommending we deny applicant’s petition.

We have considered the allegations of the Motion to Vacate and Set Aside Judgment, the Answer, and the contents of the report of the workers’ compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will treat the Motion to Vacate and Set Aside Judgment as a Petition for Removal, and we will deny removal.

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<sup>1</sup> Although dated January 6, 2022, the document was date-stamped by the Pomona District Office on November 7, 2022.

## BACKGROUND

On September 20, 2022, applicant issued a subpoena duces tecum for the personal appearance of Agreed Medical Evaluator (AME) Steven Silbart, M.D. at trial to be held at the Pomona District Office on October 21, 2022.<sup>2</sup> (Ex. I, Subpoena duces tecum, dated September 20, 2022.) The subpoena required the deponent to appear, testify, and produce a specified x-ray study.

On October 17, 2022, defendant filed a Motion to Quash Subpoena Duces Tecum by Applicant for Appearance and Records from AME Steven Silbart. The motion argued that applicant's subpoena did not set forth good cause for in-person testimony from the AME, pursuant to WCAB Rule 10682. (Cal. Code Regs., tit. 8, § 10682.) The objection also averred procedural defects in the service of the subpoena, failure to advance a witness fee as required by WCAB Rule 10647, and that the requested x-ray studies had previously been served on applicant. (Cal. Code Regs., tit. 8, § 10647.)

On October 18, 2022, the WCJ issued an Order Quashing the September 20, 2022 subpoena duces tecum.

On October 24, 2022, applicant filed a "Motion to Deny Quash of Subpoena Duces Tecum," averring that "Dr. Silbart is the ONLY PERSON that can INTERPRET, CLEAR UP, TRANSLITERATE, and EXPOUND, on his intentions, chain of thought, purpose, RATIONALE, and DIAGNOSES, because he is the AUTHOR."<sup>3</sup> (Motion to Deny/Quash, filed October 24, 2022.)

On October 31, 2022, the parties proceeded to trial, and framed the issue of the subpoena duces tecum dated September 20, 2022 seeking to compel the personal appearance of Dr. Steven Silbart for trial, the defendant's Objection dated October 17, 2022, the Order quashing the subpoena dated October 18, 2022, and applicant's Motion to Deny/Quash, filed October 24, 2022. (Minutes of Hearing (Further) and Order Taking off Calendar, dated October 31, 2022, at 2:19.) The WCJ ordered the matter taken off calendar, "pending transmittal of Joint Exhibits I through L and the Minutes of Hearing to the Board for a determination as to applicant's motion to deny/quash

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<sup>2</sup> Applicant is presently *in propria persona*. However, the parties selected Dr. Silbart to act as the Agreed Medical Evaluator while applicant was previously represented.

<sup>3</sup> Although the motion is dated November 22, 2022, it was date stamped by the Pomona District Office on October 24, 2022.

a subpoena duces tecum, which the applicant contends and this Court deems to be a petition for removal regarding the October 18, 2022, Order Quashing Subpoena Duces Tecum.” (*Id.* at 3:17.)

On November 4, 2022, defendant filed an Answer to Petition for Removal. The Answer observes that applicant’s objection letter filed on October 22, 2022 was construed by the WCJ as a Petition for Removal, and that the document was not verified in violation of WCAB Rule 10940. (Cal. Code Regs., tit. 8, § 10940(c).) The Answer further averred applicant’s motion did not establish irreparable harm or significant prejudice, that the issues which give rise to applicant’s subpoena for the personal appearance of the AME have previously been adjudicated, and that the Order quashing the subpoena was justified because applicant’s subpoena was procedurally defective and failed to show good cause for the AME’s personal appearance at trial. (Answer, at pp. 4-6.)

On November 7, 2022, applicant filed the instant Motion to Vacate and Set Aside Judgment (Motion), contending that insufficient time for service was allowed between the filing of the defendant’s Motion to Quash on October 17, 2022, and the issuance of the Order Quashing Subpoena Duces Tecum on October 18, 2022. The Motion advances several arguments for why the reporting of Dr. Silbart is allegedly procedurally deficient, incomplete, and not substantial medical evidence. (Motion, filed November 7, 2022, at pp. 2-4.)

On November 10, 2022, the WCJ filed his Report and Recommendation on Petition for Removal, observing that the parties had previously cross-examined Dr. Silbart on two occasions, and that applicant had not established good cause for the personal appearance and testimony of Dr. Silbart at trial. (Report, at p. 3.)

## DISCUSSION

Applicant’s Motion to Vacate and Set Aside Judgment challenges the order issued by the WCJ on October 18, 2022, quashing the subpoena duces tecum issued by applicant to AME Dr. Silbart on September 20, 2022. As a challenge to an interlocutory discovery order, will we treat the motion as a Petition for Removal, subject to the removal standard as set forth in WCAB Rule 10955.<sup>4</sup> (Cal. Code Regs., tit. 8, § 10955(a).)

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<sup>4</sup> We acknowledge the WCJ’s decision to treat applicant’s Motion to Deny Quash, filed on October 24, 2022, as a Petition for Removal. However, following our review of the record, we observe that it is applicant’s Motion to Vacate and Set Aside Judgment, filed on November 7, 2022, that challenges the WCJ’s interim order quashing the subpoena

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, applicant contests the order quashing her subpoena for the appearance and testimony of Dr. Silbart at trial proceedings. (Subpoena duces tecum, dated September 20, 2022.) Pursuant to WCAB Rule 10682, “[t]he Workers' Compensation Appeals Board favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a trial except upon a showing of good cause.” (Cal. Code Regs., tit. 8, § 10682(a).) As is noted by the WCJ in the Report, the AME reporting of Dr. Silbart has previously been admitted into evidence. (Report, at p. 3.) Applicant’s Motion to Vacate and Set Aside Judgement challenges the adequacy of the AME reporting, averring in part that a subpoena is necessary for applicant to challenge the AME’s assertion that he performed a physical examination of applicant. (Motion, at p. 4.)

However, applicant's Motion does not set forth a compelling rationale for why in-person testimony from the AME is necessary at trial proceedings. Nor does the Motion explain why the requested examination of the AME could not be accomplished through less time and resource-intensive discovery methods. In short, the Motion fails to set forth good cause for why direct examination of the medical witness at trial is necessary. (Cal. Code Regs., tit. 8, § 10682(a).)

Thus, when we apply the removal standard to applicant’s Motion, we are persuaded that applicant has not established that significant prejudice or irreparable harm will result from the WCJ’s Order quashing the September 20, 2022 subpoena.

We note that had we not denied the petition, we would have dismissed it for lack of verification. Labor Code section 5902 requires that a petition for reconsideration be verified. (Lab. Code, § 5902; see also Cal. Code Regs., tit. 8, § 10510(d).) In *Lucena v. Diablo Auto Body* (2000)

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duces tecum. Accordingly, we treat the later Motion to Vacate and Set Aside Judgement, filed November 7, 2022, as a Petition for Removal herein.

65 Cal.Comp.Cases 1425 [2000 Cal. Wrk. Comp. LEXIS 7197], it was held that where a petition for reconsideration is not verified as required by Labor Code section 5902, the petition may be dismissed if the petitioner has been given notice of the defect (either by the WCJ's report or by the respondent's answer) unless, within a reasonable time, the petitioner either: (1) cures the defect by filing a verification; or (2) files an explanation that establishes a compelling reason for the lack of verification and the record establishes that the respondents are not prejudiced by the lack of verification. Here, the petition is not verified and notice of this defect was specifically given in the WCJ's report. (Report, at p. 1.) Moreover, a reasonable period of time has elapsed, but applicant has neither cured the defect by filing a verification, nor offered an explanation of why a verification cannot be filed. Consequently, had we not denied the petition on the merits, we would have dismissed applicant's petition for lack of verification.

Upon return of this matter to the trial level, we recommend that the parties include among the issues for adjudication the issue of applicant's motion to strike the reporting of the AME as an issue for trial. The parties may then marshal evidence and provide testimony responsive to the issue, and if appropriate, applicant may offer a motion requesting additional testimony from Dr. Silbart. The WCJ may then rule on the motion as is deemed necessary and appropriate.

In summary, we are treating applicant's Motion to Vacate and Set Aside Judgement as a Petition for Removal of an interim discovery order, and applying that standard, find that applicant has not established that the WCJ's Order quashing the subpoena of the AME will result in significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy thereafter. We recommend that the issue of applicant's motion to strike the reporting of the AME be included in further trial proceedings, and that the parties create an evidentiary record responsive to this issue.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 21, 2023**

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

**JEANETTE FRANCE  
HALLETT, EMERICK, WELLS & SAREEN**

**SAR/abs**

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