

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

WILLIAM BOYD, *Applicant*

vs.

**LEAF FILTER - LEAF HOME SOLUTIONS; ARCH INSURANCE CO., adjusted by
PMA COMPANIES, *Defendants***

**Adjudication Number: ADJ16827801
Oakland District Office**

**OPINION AND ORDER DENYING
PETITION FOR REMOVAL**

Defendant seeks removal of the Order issued on April 30, 2024, wherein the workers' compensation administrative law judge (WCJ) ordered that defendant's subpoenas duces tecum served upon Kaiser/PMG, KFH/SCPMG, John Muir Medical Center and Brentwood Health Center be limited to medical records pertaining to applicant's musculoskeletal system.

Defendant contends that the Order violates its right to discovery.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny removal.

FACTUAL BACKGROUND

In the Report, the WCJ states:

[I]n this case, which arises out of an admitted upper-extremity injury sustained on July 7, 2022. The decision limited several subpoenas duces tecum, issued on behalf of defendant, seeking records from various medical providers. The original subpoenas sought "any and all medical records" concerning this employee. Applicant moved to quash or limit those subpoenas. The order limited them to records concerning treatment involving the employee's musculoskeletal system.

...

Following the order limiting the several subpoenas, one of the medical providers (a Kaiser facility) evidently advised the copy service sent to serve the subpoenas and

copy the records that it could not comply because of the limitation. (This is found in Exh. B to the petition, pg. 21 overall.)

...

Defendant here points out that its agent in this matter was essentially turned away by Kaiser's records custodian, and contends, therefore, that the limiting language must be stricken, in favor of unfettered access to all medical records.

Applicant cites contrary practicalities, suggesting alternatives including the employment of a special master to review and cull the records or a hearing that neither party has sought. . . . [T]he appointment of a neutral third party might well solve the problem.

...

There may be several possible solutions to the current dilemma that would allow defendant to conduct discovery reasonably tailored to maintain this employee's legitimate privacy rights. Applicant raises two such solutions; an order specifically enforcing the modified terms of the subpoena. (Report, pp. 1-3.)

DISCUSSION

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; see also *Cortez, supra*; *Kleemann, supra*.) In addition, 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.)

In this case, defendant contends that it has sustained significant prejudice or irreparable harm because the Order violates its right to discovery.

Labor Code section 5708 authorizes the WCJ to "make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties." (Lab. Code § 5708.) Thus, Labor Code section 5708 allows liberal, broad-reaching discovery. (*IBM Corp. v. Workers' Compensation Appeals Bd.*, (2001) 66 Cal.Comp.Cases 277, 278 (writ den.).)

In *IBM Corp., supra*, the court upheld the WCJ's determination that applicants, who allegedly contracted cancer as a result of chemical exposure while working at a San Jose facility, were entitled to discovery of the medical histories of workers at facilities located elsewhere. In

doing so, the court found that the WCJ's order allowing the discovery was not overly broad and that the histories were not irrelevant because they could lead to the discovery of information relevant to the applicants' injury claims. (See *IBM Corp.*, *supra*, at pp. 278-279.)

However, where the right to broad-reaching discovery encroaches on medical privacy, the scope of the privacy privilege should be determined primarily by reference to the privilege's purpose, which is to preclude the humiliation of the patient which might follow disclosure of his or her ailments; but when the disclosure sought is so related to the disclosure already made that the patient could no longer reasonably retain a privacy interest in preventing it, then the purpose of the privilege no longer exists and the privilege may be deemed waived. (See *Jones v. Superior Court of Alameda County* (1981) 119 Cal.App.3d 534, 174, overruled in part, *Williams v. Superior Court* (2017) 3 Cal.5th 531; see also *Regents of the University of California v. Workers Compensation Appeals Bd. (Lappi)* (2014) 226 Cal.App.4th 1530, 1535–1537 [79 Cal.Comp.Cases 509]; Cal. Evidence Code § 994.)

In this case, the Order limits the scope of medical records discovery to records pertaining to applicant's musculoskeletal system, but defendant argues that it effectively deprives it of discovery because it "requires a records clerk to make a medical conclusion as to what records are relevant," excludes "potentially relevant" records, and leaves it at an impasse with Kaiser, which has refused to comply with any Order limiting a medical records subpoena. (Petition, p. 4:8-11.)

Defendant's points are well taken but fail to demonstrate the requisite significant prejudice or irreparable harm for removal because defendant has other avenues for discovery. For instance, defendant may give notice to applicant to appear in accordance with Code of Civil Procedure section 198 and produce his complete Kaiser medical file. (Cal. Code Regs., tit. 8, §10642; see *Angell v. Subsequent Injuries Benefits Trust Fund*, 2021 Cal. Wrk. Comp. P.D. LEXIS 34 (Cal. Workers' Comp. App. Bd. February 2, 2021).) Should applicant object, the parties may meet and confer to resolve any discovery disputes by way of a privilege log or other means.

Alternatively, as the WCJ states in the Report, defendant may move the court for appointment of a special master empowered to conduct *en camera* review of all records produced by applicant's medical providers. (See *Garcia v. Arun Enterprises dba Subway* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 567¹ (special master appointed to attend depositions, to conduct *en*

¹ WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6, 67

camera review of disputed information and/or documents, and to provide recommendations to the parties and to the WCJ regarding the admissibility of disputed items); *Borrayo v. Tobar Industries* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 10 (WCJ may appoint a special master, pursuant to the inherent powers authorized by Labor Code section 111.) The special master may then determine whether any records in dispute are discoverable or privileged.

Accordingly, we will deny removal.

Cal.Comp.Cases 236]. While WCAB panel decisions are not binding, the WCAB may consider these decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc Opinion).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Order issued on April 30, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 24, 2024

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

**WILLIAM BOYD
GEARHEART & SONNICKSEN
RTGR LAW**

SRO/oo

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