

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

SHAWN POLLARD, *Applicant*

vs.

LEMSTRA CATTLE COMPANY; ZENITH INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ10675931
Fresno District Office**

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

Defendant seeks removal in response to a December 7, 2023 Findings of Fact and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) determined that it was improper for defendant to withhold service of sub rosa video of applicant until after the deposition of the Qualified Medical Evaluator (QME). Accordingly, the WCJ issued orders prohibiting defendant from submitting the sub rosa video to the QME and excluding the May 23, 2023 report of the primary treating physician (PTP) from evidence.

Defendant contends it should be permitted to send surveillance video to the QME because there would be no prejudice to the applicant. Defendant further contends the May 23, 2023 report of the PTP should not have been excluded from evidence as it was not obtained in violation of the labor code.

We have not received an answer from any party. The WCJ has prepared a Report and Recommendation on Petition for Removal, recommending we deny defendant's petition.

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 for the reasons discussed below, we will grant the Petition for Removal, rescind the WCJ's decision, and substitute a finding that the sub rosa video may be

submitted to the QME. We will further order the May 23, 2023 reporting of the PTP admitted in evidence.

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).)

Applicant sustained admitted injury on October 20, 2016 while employed as an Equipment Operator by Lemstra Cattle Company. Applicant has selected Michael Azevedo, M.D., as his PTP. The parties have further selected M. Nathan Oehlschlaeger, D.C., as the QME in chiropractic medicine.

Defendant obtained surveillance video of applicant on multiple occasions between December 1, 2022 and February 22, 2023. (Minutes of Hearing and Summary of Evidence (Minutes), dated September 27, 2023, at p. 2:10.)

On March 6, 2023, the parties completed the deposition of the QME. (Ex. B, Transcript of the Deposition of M. Nathan Oehlschlaeger, D.C., dated March 6, 2023.)

On April 14, 2023, defendant sent a letter to applicant's counsel attaching surveillance videos and proposing their submission to the QME, barring objection received in twenty days. (Ex. A, Correspondence from Defendant to Mr. Leiser, dated April 14, 2023.)

On April 18, 2023, applicant's counsel objected to the submission of surveillance video to the QME. (Ex. 1, Letter to Defendant, dated April 18, 2023.)

On May 23, 2023, PTP Michael Azevedo, M.D., issued a PR-2 interim report in response to a request that he review sub rosa video of applicant. (Ex. C, Report of Michael Azevedo, M.D., dated May 23, 2023.) The PTP's report discussed the films and the physician's opinions regarding applicant's work restrictions.

On September 27, 2023, the parties proceeded to trial and framed for decision the issue of whether defendant was precluded from sending surveillance video to the QME. The parties also framed the issue of the admissibility of the May 23, 2023 report of the PTP. The WCJ heard

testimony from the claims examiner and ordered the matter submitted for decision. (Minutes, at p. 1.)

On December 7, 2023, the WCJ issued the F&O, determining in relevant part that “Defendant is precluded from sending the surveillance videos in question to the QME, Dr. Oehlschlaeger.” (Finding of Fact No. 1.) The WCJ further ordered the May 23, 2023, report of PTP Dr. Azevedo excluded from evidence. (Finding of Fact No. 2.)

Defendant’s Petition acknowledges that it obtained multiple dates of surveillance videos and that “[t]he video obtained in 2017 and 2021 was not previously disclosed to any party, partly because the deposition of the applicant had been scheduled, re-scheduled, continued several times, but never actually took place.” (Petition, at p. 3:5.) Defendant contends the WCJ’s order disallowing submission of the surveillance videos to the QME is prejudicial because defendant has complied with the applicable statutes regarding submission of information to the QME. Defendant acknowledges that “[t]here is no real dispute here that the surveillance videos in question would have constituted information and had to be sent to the applicant’s attorney 20 days prior to being sent to Dr. Oehlschlaeger ... [w]hen applicant’s attorney timely objected, the only way the videos could be sent to the PQME would be by order of the court.” (Petition, at p. 7:15.) Defendant thus contends it has complied with the provisions of Labor Code section 4062.3 and Administrative Direct (AD) Rule 35 (Cal. Code Regs., tit. 8, § 35) and should be allowed to send the subject videos to Dr. Oehlschlaeger for his review.

Section 4062.3(a)(2) specifies that that “any party may provide to the qualified medical evaluator selected from a panel any of the following information ... Medical and nonmedical records relevant to determination of the medical issue.” We have previously held that sub rosa video is “information” as contemplated by section 4062.3(a)(2), and that parties wishing to submit video evidence to a QME must comply with the notice and dispute resolution protocols of section 4062.3(b). (*Maxham v. California Dept. of Corr. and Rehab.* (2017) 82 Cal.Comp.Cases 136 [2017 Cal. Wrk. Comp. LEXIS 6] (Appeals Bd. en banc); see also *Martinez v. Allied Barton Security*, September 4, 2020, ADJ9202916 [2020 Cal. Wrk. Comp. P.D. LEXIS 289]; *Wan v. Community Health Network* (April 13, 2015, ADJ5825581; ADJ9590533) [2015 Cal. Wrk. Comp. P.D. LEXIS 243].) Accordingly, it is generally permissible for a party to submit sub rosa video to the QME for the purpose of evaluating applicant’s claimed injury and any resulting disability. (See *Licea v. Screwmatic* (January 28, 2022, ADJ10568300) [2022 Cal. Wrk. Comp. P.D. LEXIS 12].)

It is also well-established that “WCJ’s have authority to decide discovery disputes.” (*Allison v. Workers’ Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 662 [84 Cal.Rptr.2d 915, 64 Cal.Comp.Cases 624].) In the event that the statutory provisions of the Labor Code are not adequate or convenient, “on appropriate motion and on appropriate showing of good cause, 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.” (*Hardesty v. Mccord & Holdren* (1976) 41 Cal.Comp.Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406].)

Generally, when a party makes a demand pursuant to *Hardesty, supra*, for service of existing evidence, including sub rosa video, the employer is obligated to promptly serve the requested materials. A failure of timely service of sub rosa video or other demanded evidence may result in the imposition of various monetary or evidentiary sanctions, including the exclusion of evidence from the record. (Lab. Code, §§ 5502(d)(3), 5813; see also *Garden Grove Unif. School Dist. v. Workers’ Comp. Appeals Bd. (Cervantes)* (2004) 69 Cal.Comp.Cases 280 [2004 Cal. Wrk. Comp. LEXIS 76] (writ den.) [defendant’s failure to timely comply with *Hardesty* demand resulted in exclusion of sub rosa video from evidence].) While our case law has historically allowed a defendant to withhold surveillance video when the deposition of the applicant is pending, prompt and continuing service of surveillance video is required following the completion of the deposition. (See *Downing v. City of Hayward* (1988) 16 CWCR 76; *Gonzales v. ADP TotalSource Group* (2024) 90 Cal.Comp.Cases 323 [2024 Cal. Wrk. Comp. P.D. LEXIS 415]; *Horton v. 7Up Bottling* (February 15, 2013, ADJ8031619) [2013 Cal. Wrk. Comp. P.D. LEXIS 55].)

Here, however, it does not appear that applicant’s deposition has been accomplished, nor has the defendant sought to introduce the sub rosa video into evidence at mandatory settlement conference on the case in chief. Rather, defendant has provided applicant with a copy of the sub rosa video and proposed to submit the video to the QME for review unless applicant objected within twenty days pursuant to section 4062.3(b). (Ex. A, Correspondence from Defendant to Mr. Leiser, dated April 14, 2023.) Applicant has filed a timely objection and the parties thereafter appropriately presented the matter to a WCJ for decision on the issue of what materials could be submitted to the QME. (Ex. 1, Letter to Defendant, dated April 18, 2023; Minutes, at p. 2.)

On this record, we discern no violation of our Rules or other statutory prohibition that would preclude the QME's review of sub rosa video. Accordingly, we will grant defendant's petition, rescind the F&O, and substitute a new finding of fact that defendant may submit the surveillance video dated December 1, 2022, December 9, 2022, December 14, 2022, February 16, 2023, February 21, 2023, and February 22, 2023, to QME Dr. Oehlschlaeger.

Applicant further objects to the admissibility of the May 23, 2023 report of PTP Dr. Azevedo, M.D., in which the physician reviewed sub rosa video prior to defendant serving the video on applicant. (Ex. C, report, Michael Azevedo, M.D., dated May 23, 2023.) The WCJ's Report observed that "[t]he reports from treating physicians ... are regularly sent to QMEs for completion of the record," and that "[i]n this case, however, having excluded the videos from review by QME, and considering that Dr. Azevedo acknowledges review of such video, providing the QME with the report of Dr. Azevedo would result in an end-around the order precluding the QME from reviewing the video." (Report, at pp. 3-4.) While section 4062.3 and AD Rule 35 specify rules for submission of information to a QME, applicant cites to no statutory or regulatory authority that would otherwise preclude the submission of sub rosa video evidence to a PTP. We share the WCJ's concerns regarding the potential for creating an "an unfair playing field," and stress that the WCJ is entrusted with the authority to "safeguard against unfair surprise." (Report, at p. 3; *Hardesty, supra*, 41 Cal.Comp.Cases at p. 114.) Accordingly, and pursuant to WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421) and section 5813, the WCJ has the discretion to levy sanctions on parties who engage in bad faith tactics. "Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10421(b).) Such actions include a "[f]ailure to timely serve documents (including but not limited to medical reports and medical-legal reports)," and "[f]ailing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure, with the regulations of the Administrative Director, or with any award or order of the Workers' Compensation Appeals Board, including an order of discovery...." (Cal. Code Regs., tit. 8, § 10421(b)(3)-(4).)

However, having concluded that defendant followed the procedure for submission of sub rosa video to the QME under section 4062.3(b), and that the sub rosa video may be submitted to

the QME as a result, we discern no basis upon which to exclude the PTP's reporting following review of the same evidence. Accordingly, and in addition to the substituted findings of fact discussed above, we will further substitute an order admitting the May 23, 2023 report of PTP into evidence.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of December 7, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of December 7, 2023 is **RESCINDED**, with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Defendant is entitled to submit the sub rosa video dated December 1, 2022, December 9, 2022, December 14, 2022, February 16, 2023, February 21, 2023, and February 22, 2023, to Qualified Medical Evaluator Nathan Oehlschlaeger, D.C.

ORDER

- a. Exhibit C, the report of Michael Azevedo, M.D., dated May 23, 2023 is admitted into evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2025

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

**SHAWN POLLARD
LAW OFFICES OF BRYAN K. LEISER
CHERNOW, PINE & WILLIAMS**

SAR/abs

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