

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4  
5 **AMADOR PADILLA,**

6 *Applicant,*

7 **vs.**

8 **LOS ANGELES METROPOLITAN**  
9 **TRANSPORTATION AUTHORITY,**  
10 **Permissibly Self-Insured,**

11 *Defendant (s).*

**Case No.: ADJ6981165**

**OPINION AND ORDERS  
DISMISSING PETITION FOR  
RECONSIDERATION AND  
GRANTING REMOVAL AND  
DECISION AFTER REMOVAL**

12  
13 Defendant seeks reconsideration or removal following the April 12, 2010 Order issued by a  
14 workers' compensation administrative law judge (WCJ) wherein the WCJ allowed defendant to  
15 have an employer representative "from HR/Claims Management, not applicant's manager or co[-]  
16 worker," present at applicant's deposition. Applicant's underlying claim involves a specific injury  
17 on December 15, 2007 to his neck, shoulders, elbows, wrists, hand, back and psyche  
18 (ADJ6981165).<sup>1</sup> Defendant disputes the nature and extent of disability and the parts of applicant's  
19 body which were injured.

20 In its Petition, defendant seeks reconsideration or removal contending that the WCJ erred in  
21 limiting the type of employer representative allowed to attend applicant's deposition without a  
22 hearing, thereby denying defendant due process. Defendant further argues that it is prejudiced in its  
23 ability to conduct discovery by the WCJ's limitation on the type of the employer representative that  
24 can be present at applicant's deposition. No Answer was found in the Electronic Adjudication  
25 Management System (EAMS) or in the file forwarded to us.

26  
27 <sup>1</sup> Applicant's request for a protective order and the WCJ's Order apply only to ADJ6981165. The case number of applicant's earlier claim (ADJ3709698 (AHM 0148860)), for his December 15, 2007 injury to his shoulders, spine, and left hand and arm, was included in defendant's Answer to applicant's request and in the Petition for Reconsideration, but does not appear to be at issue with respect to the disputed protective order.

1 We have considered the allegations of defendant's petition seeking either reconsideration or  
2 removal and the contents of the record, including the WCJ's "Report and Recommendation on  
3 Petition for Reconsideration or in the Alternative Petition for Removal" (Report). Based on our  
4 review of the record and for the reasons stated herein, we will dismiss defendant's Petition for  
5 Reconsideration. However, the majority will grant removal.

6 Initially, we note that reconsideration may be had only of a final order, decision, or award.  
7 (Lab. Code §§ 5900, subd. (a); 5902.) Interlocutory procedural orders are not final orders within  
8 the meaning of Labor Code section 5900. A "final" order has been defined as one "which  
9 determines any substantive right or liability of those involved in the case." (*Safeway Stores, Inc. v.*  
10 *Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410];  
11 *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39  
12 [43 Cal.Comp.Cases 661]; Cal. Workers' Compensation Practice (Cont.Ed.Bar 2009) §§ 21.8-21.9,  
13 pp. 1678-1680.)

14 Here, the WCJ's April 12, 2010 Order limiting defendant to have an employer representative  
15 from "HR/claims management" and precluding applicant's manager or co-worker is not a final  
16 order subject to reconsideration. The order deals with a discovery dispute and does not determine  
17 any substantive right or liability of either party. Thus, reconsideration is not appropriate and we  
18 will dismiss defendant's Petition for Reconsideration.

19 With respect to removal, the Board has the discretion to remove a case pursuant to Labor  
20 Code section 5310. This is an extraordinary remedy available where a petitioner establishes that  
21 substantial prejudice or irreparable injury will result if removal is not granted. (Cal. Code Regs.,  
22 tit. 8, § 10843; see *Swedlow, Inc. v. Workers' Comp. Appeals Bd. (Smith)* (1985) 48  
23 Cal.Comp.Cases 476 (writ denied); *Bulmer v. Circle K Corp.* (1986) SAC 93830, 14 Cal. Workers'  
24 Comp. Rptr. 160 (Board Panel); *Lubin v. Berkeley East Convalescent Hospital* (1976) 41  
25 Cal.Comp.Cases 283 (Board panel); *Hardesty v. McCord & Holdren, Inc., et al.*, (1976) 41  
26 Cal.Comp.Cases 111 (Board panel).) Here, the majority is persuaded defendant will suffer  
27 significant prejudice as a result of the WCJ's April 12, 2010 Order and will grant removal.

1           In his Application for Adjudication of Claim (Application), filed on September 4, 2009,  
2 applicant initially alleged an August 5, 2009 specific industrial injury to his neck (200), back (420),  
3 shoulder (450), upper extremity (300) and stress (841) explaining that “bus brakes went out and bus  
4 hit pole causing injuries to neck, back, shoulders, right upper extremity, psyche, sleep.”  
5 (Application, at p. 3.) Employment Development Department provided benefits beginning  
6 September 11, 2009.

7           At his deposition on December 17, 2009, defendant’s assistant transportation manager,  
8 Carla Aleman, was present. Applicant objected to answering questions regarding his medical  
9 history, psychiatric history and medical conditions in front of Ms. Aleman and sought a protective  
10 order precluding any employee of the employer from attending his deposition. Applicant conceded  
11 that a person “involved in the administration and adjusting of the claim, not a manager, not an  
12 employee of the MTA, who the applicant’s [sic] works with” could be present at his deposition. (*Id.*  
13 at page 6.) Defendant filed its objection. At the April 12, 2010 Mandatory Settlement Conference  
14 (MSC), the WCJ issued the protective order limiting the employer’s representative at applicant’s  
15 deposition to a person “from HR/claims management, not applicant’s manager or co-worker,” from  
16 which defendant seeks removal.

17           Parties are permitted to obtain discovery “regarding any matter, not privileged, that is  
18 relevant to the subject matter involved in the pending action or to the determination of any motion  
19 made in that action, if the matter either is itself admissible in evidence or appears reasonably  
20 calculated to lead to the discovery of admissible evidence.” (Code Civ. Proc., § 2017.010.) Code of  
21 Civil Procedure sections 2025.010, et seq. govern oral depositions taken in California. Protective  
22 orders may be granted as justice requires “to protect any party, deponent, or other natural person or  
23 organization from unwarranted annoyance, embarrassment or oppression, or undue burden or  
24 expense” based on a showing of good cause, accompanied by a meet and confer declaration stating  
25 facts showing a reasonable and good faith attempt at informal resolution of the issue. (Code Civ.  
26 Proc., §§ 2016.040; 2025.420, subs. (a) and (b).)

27           In this matter, the majority is not persuaded that applicant has shown that he would be

1 subjected to unwarranted annoyance, embarrassment or oppression to support his request for  
2 exclusion of Ms. Aleman as the representative of his employer at his deposition or, more broadly,  
3 another management representative of the employer. In his request for a protective order, applicant  
4 stated only that he had “a problem discussing his medical condition in front of the employer at his  
5 deposition.” (Applicant’s Motion for a Protective Order, dated 3/24/10, p. 3.) Applicant  
6 contradictorily described Ms Aleman as “applicant’s manager who he works with” and as “a perfect  
7 stranger.” (Applicant’s Motion for a Protective Order, dated 3/24/10, pp. 1, 6.) He has not set forth  
8 any facts establishing good cause for the issuance of a protective order. The WCJ’s Order was  
9 based on the pleadings consisting of applicant’s written motion and defendant’s written objection.  
10 As the WCJ’s April 12, 2010 Order is not justified on this record, we will rescind it. Defendant’s  
11 contention regarding the need for a trial is therefore moot and we will not address it.

12 Additionally, the statute provides that a protective order may include a direction “[t]hat  
13 designated persons, other than the parties to the action and their officers and counsel, be excluded  
14 from attending the deposition.” (Code Civ. Proc., § 2025.420, subd. (b)(12).) While the statute  
15 does not provide who may or may not be present at a deposition, it recognizes that a party has a  
16 right to be present. In *Willoughby v. Superior Court* (1985) 172 Cal.App.3d 890 [218 Cal.Rptr.  
17 486], the court vacated a judge’s protective order excluding an employee’s supervisors from her  
18 deposition. In that case, the employee had filed suit against the corporation and two individual  
19 supervisors alleging, inter alia, harassment, physical and verbal abuse, intimidation, threats, and  
20 false accusations. When her deposition was noticed, the employee sought a protective order  
21 declaring that she did not believe that she could calmly testify in the presence of defendants. In  
22 vacating the protective order, the Court of Appeal noted that “[t]he clear language of the statute  
23 authorizing ‘no one present except the parties’<sup>[2]</sup> expressly precludes an order excluding the  
24 parties.” (*Willoughby v. Superior Court, supra*, 172 Cal.App.3d at p. 892.) The court noted that the  
25 absence of a party would significantly and unreasonably impair an attorney’s ability to represent the  
26 client. Here, there is no statutory basis to exclude defendant’s representative from applicant’s

27 <sup>2]</sup> The statutory provision listing specific protective orders was then contained in Code of Civil Procedure section 2019,  
subdivision (b)(1).

1 deposition.

2 While applicant has not specifically raised issues regarding privilege, he has claimed a  
3 "right to medical privacy" and noted that "he has alleged psyche and orthopaedic injuries and  
4 therefore waives his rights to medical privacy." (Applicant's Motion for a Protective Order, dated  
5 3/24/10, p. 3.) In *Britt v. Superior Court* (1978) 20 Cal.3d 844 [143 Cal.Rptr. 695], a group of  
6 homeowners sued the nearby airport for decreased property values, personal injuries and emotional  
7 disturbance allegedly caused by the noise, vibrations, air pollution and smoke from the jet airplanes.  
8 In denying defendant's effort to discover the plaintiffs' entire lifetime medical histories, the  
9 California Supreme Court discussed the statutory exception to the physician-patient (Evid. Code, §§  
10 990, et seq.) and psychotherapist-patient privileges (Evid. Code, §§ 1010, et seq.). The "patient-  
11 litigant" exception to the physician-patient privilege provides that "[there] is no privilege . . . as to a  
12 communication relevant to an issue concerning the condition of the patient if such issue has been  
13 tendered by . . . [the] patient." (Evid. Code, § 996, subd. (a).) A similar exception to the  
14 psychotherapist-patient privilege relating to the mental or emotional condition of a patient is found  
15 in Evidence Code section 1016, subdivision (a). The Court held that there was a limited waiver of  
16 the privileges with respect to the physical and mental conditions which have been put in issue, but  
17 not as to all of a plaintiff's past medical history. In *Allison v. Workers' Comp. Appeals Bd.* (1999)  
18 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624], the court applied the rationale in the *Britt* case to  
19 limit the scope of defendant's discovery of applicant's hospitalization history prior to 1965.

20 Here, applicant has filed a workers' compensation claim alleging "psyche and orthopaedic"  
21 injuries (Applicant's Motion for a Protective Order, dated 3/24/10, p. 3). In his petition for the  
22 protective order, applicant acknowledged his waiver as to privilege with respect to the conditions  
23 he placed in issue. The applicability of the privilege and any waiver, while relevant to the scope of  
24 discovery, is not relevant to the issue of who defendant may select as its representative to attend  
25 applicant's deposition.

26 Finally, we note that Labor Code section 3762 provides that an insurer, a third-party  
27 administrator of a self-insured employer and employees of a self-administered self-insured

1 employer are precluded from disclosing individually identifiable medical information of an  
2 applicant to the employer,<sup>3</sup> with specified exceptions regarding diagnosis and treatment of injuries  
3 which are the subject of a workers' compensation claim, or information which is necessary for  
4 modification of an employee's job duties. This section does not deal with information disclosed by  
5 an applicant in his deposition testimony.

6 Accordingly, we will dismiss defendant's Petition for Reconsideration. The majority will  
7 grant defendant's Petition for Removal, rescind the WCJ's April 12, 2010 Order limiting defendant  
8 to an employer representative from Human Resources or claims management to attend applicant's  
9 deposition.

10 For the foregoing reasons,

11 **IT IS ORDERED** that defendant's Petition for Reconsideration be, and the same hereby is,  
12 **DISMISSED.**

13 **IT IS FURTHER ORDERED** that Defendant's Petition for Removal be, and the same  
14 hereby is, **GRANTED.**

15 **IT IS FURTHER ORDERED** that this matter be, and it hereby is, **REMOVED** to the  
16 Appeals Board (Lab. Code §5310).

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24

25 <sup>3</sup> Civil Code section 56.05 defines "medical information" as "any individually identifiable information, in electronic or  
26 physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical  
27 company, or contractor regarding a patient's medical history, mental or physical condition, or treatment. 'Individually  
identifiable' means that the medical information includes or contains any element of personal identifying information  
sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address,  
telephone number, when a social security number, or other information that, alone or in combination with other  
publicly available information, reveal that the individual's identity." (Civ. Code, § 56.05, subd. (g).)

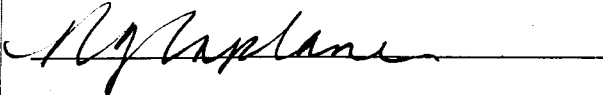
1           **IT IS FURTHER ORDERED** that as the Decision After Removal of the Workers'  
2 Compensation Appeal Board, the Order issued on April 12, 2010, be, and it hereby is,  
3 **RESCINDED.**

4  
5 WORKERS' COMPENSATION APPEALS BOARD

6  
7 

8 ALFONSO J. MORESI

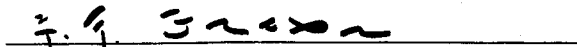
9 I CONCUR.

10 

11 RONNIE G. CAPLANE

12  
13 I CONCUR AND DISSENT:  
14 (See attached Concurring and Dissenting Opinion)



15  
16 

17 FRANK M. BRASS

18  
19 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

20 **JUN 28 2010**

21 SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT  
22 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

23 AMADOR PADILLA  
24 ARTHUR CSILLAG  
25 TENNENHOUSE MINASSIAN

26 ST/csl



CONCURRING AND DISSENTING OPINION

I concur with the majority that defendant's Petition for Reconsideration should be dismissed.

With respect to removal, I would deny the petition for the reasons stated by the WCJ in his Report. I am persuaded that if applicant's immediate supervisor or a co-worker were to appear throughout applicant's deposition, applicant's right to privacy would be compromised. As noted by the WCJ, the April 12, 2010 Order would preserve a reasonable balance between applicant's limited right to privacy and defendant's right to have a representative of the employer present throughout the deposition. For these reasons, I would deny removal in this matter.



WORKERS' COMPENSATION APPEALS BOARD

*F. M. Brass*

FRANK M. BRASS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

**JUN 28 2010**

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

AMADOR PADILLA  
ARTHUR CSILLAG  
TENNENHOUSE MINASSIAN

*ap/14*

*ST/csl*

CASE NUMBER: ADJ6981165 / ADJ3709698

AMADOR PADILLA

-vs.-

LOS ANGELES COUNTY  
METROPOLITAN  
TRANSPORT  
AUTHORITY;  
LOS ANGELES  
METROPOLITAN  
AUTHORITY;

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE: Michael Greenberg

DATE: May 5, 2010

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**  
**OR IN THE ALTERNATIVE PETITION FOR REMOVAL**

**I.**  
**INTRODUCTION**

Applicant, Amadore Padilla, while employed on August 5, 2009 as a Bus Operator for Los Angeles County Metropolitan Transportation Authority ("LACMTA"), permissibly self insured, allegedly sustained injury to neck, shoulders, elbows, wrists, hand, back and psyche when the bus he was operating struck a traffic light pole.

Subsequent to filing an application for adjudication of claim applicant's deposition took place on December 17, 2009. Present at the deposition were applicant, applicant's counsel, Arthur Csillag, Esq., defense counsel, Edwin E. Minassian, Esq. and Assistant Transportation Manager for Division 10, Carla Aleman for the employer LACMTA.

During the deposition applicant attorney objected to the applicant answering questions about his medical history, psychiatric history and medical condition in the presence of his manager Ms. Aleman. The deposition was adjourned.

February 22, 2010 applicant filed a motion for a protective order limiting the employer representative at the deposition to one who is involved in the administration and adjusting of the claim, and not a manager or employee who applicant works with based on Labor Code Section 3762 and California Civil Code Section 56.

April 12, 2010 the parties attended a status conference on the motion for a protective order. Both sides submitted briefs and oral arguments regarding the correct interpretation of Labor Code Section 3762 and California Civil Code Section 56.

Over defendant's objection the undersigned issued the order limiting the employer representative at applicant's deposition to be from HR/Claims, and not applicant's manager or co-worker. Defendant then requested the matter be set for trial. The request to set the matter for trial was denied. As this case involved an interim discovery order setting the matter for trial did not appear necessary. Both sides were given the opportunity to argue their case at the status conference.

April 28, 2010 defendant filed a timely, verified petition for reconsideration and/or in the alternative for removal to set aside the discovery order at issue, and to request an order compelling applicant to attend the deposition with applicant's supervising manager present.

## II. FACTS

Applicant agrees that defendant had the right to discover relevant information related to applicant's claim of injury to his psyche. Applicant agrees that he must answer defendant's questions about his medical history, psychiatric history and medical condition at the deposition. Applicant does not dispute the employer has a right to be present throughout applicant's deposition. The issue is whether of Labor Code Section 3762 and California Civil Code Section 56 provide a basis for limiting the employer's representative to be from HR/Claims not applicant's supervising manager or co-worker.

III.  
DISCUSSION

In order to preserve a balance between applicant's right to privacy and defendant's right to have an employer representative appear throughout the deposition the undersigned contemplated the defendant would have in place a "firewall" between HR/Claims department and the department where the applicant worked. The employer representative from HR/Claims department would be entitled to all information, and the applicant's right to privacy would be intact.

Defendant filed for reconsideration or in the alternative removal.

As the order at issue is related to a discovery dispute, and does not determine any substantive right or liability of those involved in the case, it is not a final order for purposes of seeking reconsideration. Labor Code Sections 5900, 5903; Rymer v Hagler (1989) 211 Cal.App.3d 1171, 1180; Safeway Stores Inc. v WCAB (Pointer)(1980) 45 Cal.Comp.Cases 410, 413. Therefore, defendant's alternative petition for reconsideration should be dismissed.

Defendant alleges compliance with the discovery order at issue would result in significant prejudice and/or irreparable harm. Defendant makes reference to, "...the sheer size of LACMTA..." page 7 lines 12-13 of the April 28, 2010 petition for reconsideration and/or removal. For a business entity as large as LACMTA it would not constitute significant prejudice and/or irreparable harm to arrange for a representative from HR/Claims to appear at the deposition. If a representative from HR/Claims appeared at the deposition the employer and defense counsel would be free to confer during applicant's testimony.

Defendant relies on Law Offices of Thomas L. Plumb et. al. v. Workers' Compensation Appeals Board (Bradley) 70 CCC 783 (2005) (unpublished case). Citing an unpublished case violates California Rules of Court, Rule 8.1115(a). In Bradley there was an order regarding \$750.00 in sanctions relating to a petition to compel a deposition. The case at bar does not involve an order for sanctions. In Bradley there is no analysis of Labor Code Section 3762 or California Civil Code Section 56.

Defendant relies on Lowy Development Corp. v. Sup. Court of Los Angeles

County, 190 Cal. App. 3d 317 (1987) indicating, "...the intent of the opinion is to provide the court with flexibility to fashion a protective order which is appropriate to a particular case." Id at 321. In 2000 the Legislature added Labor Code Section 3762 section (c) citing California Civil Code Section 56 by which insured, third party administrators and their employees and agents pursuant to Labor Code Section 3702.1. are prohibited from disclosing to an employer (in this case Assistant Transportation Manager for Division 10, Ms. Aleman) any medical information about an employee who has filed a workers' compensation claim with two exceptions.

First, the diagnosis may be provided to the employer if the diagnosis would affect the employer's premium. Second, medical information may be provided to the employer that is necessary to make necessary modifications of the employee's work duties. Neither exception allows for the Assistant Transportation Manager for Division 10, Ms. Aleman to be present throughout the deposition. Ms. Aleman is not the employer's insurer, third-party administrator retained by a self-insured employer pursuant to Labor Code section 3702.1.

The discovery order at issue is intended to balance applicant's limited right to privacy with defendant's right to have an employer representative appear throughout the deposition.

If the Court were to adopt defendant's position, that defendant be allowed to have applicant's immediate supervisor or co-worker appear throughout applicant's deposition applicant's right to privacy would not exist, and Labor Code Section 3762 and California Civil Code Section 56 would be without force or effect.

#### IV.

#### RECOMMENDATION

It would not constitute significant prejudice and/or irreparable harm for LACMTA to arrange for a representative from HR/Claims to appear at the deposition. Therefore, the undersigned recommends the petition for reconsideration be dismissed, and the petition for removal be denied.

DATE: May 6, 2010

Michael K Greenberg

**Michael Greenberg**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

Service by mail on all parties as  
Shown on the Official Address  
Record on: 5/6/10  
By: J. Meyers