

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **KELLY SNOW,**

5 *Applicant,*

6 vs.

7 **HEALTH NET, INC. and SEDGWICK CMS,**

8 *Defendants.*

Case No. ADJ8396609
(Sacramento District Office)

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

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11 Applicant has filed a timely, verified Petition for Removal, requesting that the Appeals Board
12 rescind the Orders dated June 19, 2013, wherein the workers' compensation administrative law judge
13 (WCJ) denied applicant's Petition to Quash Subpoena Duces Tecum, denied applicant's Petition to
14 Quash the Deposition of J. Bradley, LCSW; and ordered applicant to sign a release for the records of J.
15 Bradley, LCSW. Applicant contends that both she and Ms. Bradley may assert and have asserted the
16 psychotherapist-patient privilege and refused to disclose confidential communications between them; and
17 that because Ms. Bradley is neither a physician nor a psychologist, pursuant to Labor Code section
18 3209.3(a) and (b),¹ her records cannot be reviewed by an evaluating qualified medical evaluator (QME),
19 pursuant to Administrative Director Rule 35(a)(1) and (2) (Cal. Code Regs., tit. 8, § 35(a)(1) and (2)) and
20 therefore are not discoverable. Defendant has filed an Answer.

21 On June 21, 2012, applicant filed an Application for Adjudication of Claim, alleging that, while
22 employed as a provider customer service representative on March 14, 2011, she sustained an industrial
23 injury to her upper extremities, wrist, shoulders and back. On July 2, 2012, she filed an amended
24 Application, alleging additional injury to her psyche. She apparently disclosed in her deposition that she
25 had been treated by Ms. Bradley in the past. Defendant has attempted to obtain the records of Ms.

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27 ¹ Unless otherwise specified, all statutory references are to the Labor Code.

1 Bradley, contending that these records are relevant to causation of the alleged psychiatric injury and
2 apportionment of permanent disability caused by that injury. The WCJ has ordered applicant to sign a
3 release for the records of Ms. Bradley and has ordered the deposition of Ms. Bradley.

4 As to whether the records of Ms. Bradley can be provided to the QME for review, Rule 35(a)(5)
5 provides that “[n]on-medical records . . . which are relevant to determination of medical issue(s) in
6 dispute” may be provided to a QME. Even though Ms. Bradley is not a physician pursuant to section
7 3209.3(a) and (b), her records and her testimony are “non-medical records” and may be sent to the QME.

8 As to the psychotherapist-patient privilege, as a licensed clinical social worker, Ms. Bradley is a
9 “psychotherapist” pursuant to Evidence Code section 1010(c). Applicant is the “holder of the privilege”
10 pursuant to Evidence Code section 1013(a). Both she and Ms. Bradley may claim the privilege to refuse
11 to disclose confidential communications between them, pursuant to Evidence Code section 1014(a) and
12 (c). However, Evidence Code section 1016 provides: “There is no privilege under this article as to a
13 communication relevant to an issue concerning the mental or emotional condition of the patient if such
14 issue has been tendered by: (a) The patient.”

15 However, the waiver contemplated by Evidence Code section 1016 may not be a complete waiver
16 of the privilege but only a limited waiver concomitant with the purposes of the section. As the Supreme
17 Court has stated:

18 “[We] held in *In re Lifschutz* (1970) 2 Cal.3d 415 that ‘the ‘automatic’ waiver of
19 privilege contemplated by [the patient-litigant exception] must be construed not as a
20 complete waiver of the privilege but only as a limited waiver concomitant with the
21 purposes of the exception. Under section 1016 disclosure can be compelled only
22 with respect to *those mental conditions* the patient-litigant has ‘[disclosed] . . . by
23 bringing an action in which *they* are in issue’ [citation]; communications which are
24 not directly relevant to those specific conditions do not fall within the terms of
25 section 1016’s exception and therefore remain privileged. Disclosure cannot be
26 compelled with respect to other aspects of the patient-litigant’s personality even
27 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.*’ (Final italics added; remaining italics in original.) (2 Cal.3d at p. 435.) In
Roberts v. Superior Court (1973) 9 Cal.3d 330, 337-339 [107 Cal.Rptr. 309, 508
P.2d 309], our court explicitly reaffirmed *Lifschutz*’s narrow interpretation of the
scope of the patient-litigant exception.

1 “Our holdings in *Lifschutz* and *Roberts* support plaintiffs' contention that the
2 discovery order in the instant case is impermissibly overbroad. As *Lifschutz*
3 explains, plaintiffs are ‘not obligated to sacrifice all privacy to seek redress for a
4 specific [physical,] mental or emotional injury’; while they may not withhold
5 information which relates to any physical or mental condition which they have put
6 in issue by bringing this lawsuit, they are entitled to retain the confidentiality of all
7 unrelated medical or psychotherapeutic treatment they may have undergone in the
8 past. The trial court thus obviously erred in ordering plaintiffs to disclose to
9 defendant their entire lifetime medical histories and this aspect of the challenged
10 discovery order must also be vacated.” *Britt v. Superior Court* (1978) 20 Cal.3d
11 844, 863-864.

12 In this case, Ms. Bradley wrote a letter dated March 29, 2013, to the process server of the SDT for
13 her records, stating: “The records that I have regarding the above named precede the accident of March
14 14, 2011 by a number of years. As these records do not relate to this event or injuries, I do not feel
15 comfortable in releasing her private information.” Therefore, there is an issue as to whether the records
16 of Ms. Bradley relate to the mental conditions that applicant has disclosed in this case or whether they
17 relate to “other aspects of [her] personality,” in which case disclosure may not be compellable. For this
18 reason, the WCJ in his Report and Recommendation recommends that we grant applicant’s petition so
19 that there can be further consideration of whether some or all of Ms. Bradley’s records may still be
20 privileged, despite applicant’s allegation of injury to psyche in her injury of March 11, 2011.

21 We agree. Therefore, we grant removal, rescind the Orders dated June 19, 2013, and return this
22 matter to the trial level for further proceedings. We express no opinion as to whether the records of Ms.
23 Bradley must be disclosed.

24 For the foregoing reasons,

25 **IT IS ORDERED** that applicant’s Petition for Removal is **GRANTED**.

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