

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**
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4 **IRENE YERA,**

5 *Applicant,*

6 vs.

7 **J.C. PENNEY; NATIONAL UNION FIRE**
8 **INSURANCE COMPANY OF PITTSBURGH,**
9 **PENNSYLVANIA,**

10 *Defendants.*

Case No: ADJ8467469
(Van Nuys District Office)

OPINION AND ORDER
GRANTING PETITION
FOR REMOVAL AND
DECISION AFTER REMOVAL

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12 Defendant petitions for removal of this case to the Appeals Board following the February 14,
13 2013 decision of the WCJ to deny defendant's motion to compel applicant to attend her deposition in the
14 presence of the employer representative store manager.

15 Applicant claims to have incurred industrial injury to her neck, upper extremities, chest, nervous
16 system and other body parts while employed as sales assistant by defendant during the period March 22,
17 2011 to May 11, 2012.

18 Defendant contends that it will be denied due process and will incur substantial prejudice if
19 applicant is not compelled to attend the deposition with the employer representative in attendance.

20 An answer was not received. The WCJ provided a Report and Recommendation on Petition for
21 Removal (Report) recommending that defendant's petition be granted.

22 Defendant's petition is granted and as our Decision after Removal the WCJ's February 14, 2013
23 decision is rescinded for the reasons expressed by the WCJ in his Report, which is incorporated by this
24 reference, and for the reasons below.

25 Defendant's attorney avers in the verified petition that applicant's deposition was noticed to occur
26 at his office on August 10, 2012, pursuant to a stipulation with applicant's attorney. Applicant appeared
27 at the noticed time and location but refused to go forward in the presence of defendant's store manager,

1 who was designated as the employer's representative. Defendant then petitioned to compel the
2 deposition to proceed in the store manager's presence, but the WCJ denied the petition at the
3 February 14, 2013 conference. Applicant has not sought any kind of protective order concerning the
4 conduct of the deposition.

5 In his Report, the WCJ explains that he denied defendant's motion at the February 14, 2013
6 conference because he was informed by applicant's representative at that time that the presence of the
7 store manager "would intimidate applicant." However, the WCJ further writes that defendant is correct
8 that applicant's counsel did not seek a protective order prior to the deposition and that no specifics were
9 provided at the conference "regarding applicant's perception of being intimidated by the manager." In
10 the absence of such specifics, the WCJ agrees with defendant that it has the right to have the manager
11 present during applicant's deposition. We agree with the WCJ's analysis and recommendation as set
12 forth in his Report.

13 In *Padilla v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 191 (writ den.) (*Padilla*)
14 the panel rescinded the order of a WCJ that limited the type of employer representative allowed to attend
15 the applicant's deposition. In a split decision, the panel majority found that the applicant did not show
16 that he would be subject to unwarranted annoyance, embarrassment, or oppression so as to support
17 exclusion of the employer's management representative from the deposition. The panel majority further
18 wrote that there was no statutory basis for such exclusion, and that Labor Code section 3762, which
19 prohibits insurers, third-party administrators of self-insured employers, and employees of self-
20 administered self-insured employers from disclosing individually identifiable medical information
21 regarding the applicant to the employer with specified exceptions, does not apply to information
22 disclosed by an applicant in a deposition.

23 The *Padilla* decision also noted that Code of Civil Procedure section 2025.420(b)(12) provides
24 that a party may seek a protective order that may include a direction "[t]hat designated persons, other
25 than the parties to the action and their officers and counsel, be excluded from attending the deposition,"
26 which also indicates that a party has a right to be present during the deposition. (See *Willoughby v.*
27 *Superior Court* (1985) 172 Cal.App.3d 890 [protective order excluding plaintiff's supervisors from

1 deposition struck down by court because absence of the party would significantly impair attorney's
2 ability to represent client].)

3 Unlike in *Padilla*, we are not called upon to review a protective order because applicant has not
4 requested such an order and none has been issued by the WCJ. There also is no evidence from applicant
5 identifying any right to privacy that would or could be affected if the store manager is present during the
6 deposition, which was the concern expressed by the dissenting Commissioner in *Padilla*. To the
7 contrary, the only reason given by applicant's representative to the WCJ for not proceeding at the
8 August 10, 2012 deposition was that applicant would feel intimidated by the store manager's presence.
9 Such a summary assertion of subjective feelings is not sufficient reason to exclude the store manager
10 from the deposition, particularly in light of the fact that applicant is represented by counsel and has
11 remedies available to address any improper behavior that may occur at the deposition.

12 Under the present circumstances of this case, we accept the WCJ's recommendation in his Report
13 and rescind the February 14, 2013 decision denying defendant's petition to compel. Upon return of the
14 case to the trial level, the parties and the WCJ may take such further action to proceed with applicant's
15 deposition as appropriate and in accordance with this decision.

16 For the foregoing reasons,

17 **IT IS ORDERED** that defendant's Petition for Removal following the February 14, 2013
18 decision of the workers' compensation administrative law judge to deny defendant's motion to allow a
19 representative of the employer to be present during applicant's deposition is **GRANTED**.

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1 IT IS FURTHER ORDERED as the Decision After Removal of the Appeals Board that the
2 February 14, 2013 decision of the workers' compensation administrative law judge to deny defendant's
3 motion to allow a representative of the employer to be present during applicant's deposition is
4 **RESCINDED** and the case is **RETURNED** to the trial level for further proceedings and decisions by a
5 workers' compensation administrative law judge as appropriate and in accordance with this decision.

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7 **WORKERS' COMPENSATION APPEALS BOARD**
8

9 Frank M. Brass
10 **FRANK M. BRASS**

11 **I CONCUR,**

12 Alfonso J. Mores
13 **ALFONSO J. MORES**
14

15 Deidra E. Lowe
16 **DEIDRA E. LOWE**
17



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

20
21 **APR 17 2013**

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

- 24 **IRENE YERA**
25 **LOUIS BERMEO**
26 **KEGEL TOBIN**

abs

27 *JFS/abs*