WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANIKA MCFALL, *Applicant*

vs.

ADT SERVICES SYSTEM;
OLD REPUBLIC INSURANCE COMPANY,
administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ10393749
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order Re: Medical Treatment (F&O) issued on August 9, 2024, wherein the workers' compensation administrative law judge (WCJ) found in relevant part that there is need for further medical treatment in the form of caregiver services for 8 hours per day, consistent with the reasoning in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 [2014 Cal. Wrk. Comp. P.D. LEXIS 98] (*Patterson*). The WCJ ordered defendant to authorize continuing caregiver services until there is a change of circumstances showing that the services are no longer reasonably required to cure or relieve from the effects of the industrial injury.

Defendant contends that its home healthcare service authorization was not ongoing and is thus distinguishable from *Patterson*. Defendant further contends that disputes regarding the provision of medical treatment are subject to the Utilization Review (UR) and Independent Medical Review (IMR) processes.

We have received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (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 discussed below, and for the reasons discussed in the Report, which we adopt and incorporate herein, we will deny the Petition.

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." Here, according to Events, the case was transmitted to the Appeals Board on September 19, 2024, and the next business day that is 60 days from the date of transmission is November 18, 2094. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after November 18, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides

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[1] All further references are to the Labor Code unless otherwise noted.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 19, 2024, and the case was transmitted to the Appeals Board on September 19, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 19, 2024.

II.

In addition to the WCJ's comprehensive Report, we observe the following. Defendant's Petition directs our attention to a panel decision, *Romo v. Pac. Bell. Tel. Co.* (December 11, 2019, ADJ2985314, ADJ4284083, ADJ9015904) [2019 Cal. Wrk. Comp. P.D. LEXIS 525] (*Romo*) and based thereon asserts "if a Request for Authorization (RFA) is limited in duration of care or specified end date then *Patterson* does not apply." (Petition, at p. 4:15.) In *Romo*, however, the parties entered into a stipulation to provide home health care services pursuant to an RFA dated August 7, 2018. When a dispute arose involving compliance with the stipulation, neither party moved the RFA that was the basis of the stipulation into evidence. We returned the matter to the trial level for a determination as to the nature of the stipulation and for review of the underlying RFA it was based on. (*Romo*, at p. 6.) *Romo* thus presented the threshold issue of compliance with a stipulation to provide services, rather than an analysis of change in circumstance as described in *Patterson* and is consequently of limited persuasive value to the present matter.

Here, we agree with the WCJ's observation that defendant bears the burden to establish a material change in circumstance warranting a renewed review of medical necessity through the RFA and Utilization Review process. Our holding in *Patterson* was clear that "it is defendant's burden to show that the continued provision of the services is no longer reasonably required because of a change in applicant's condition or circumstances," and that "[d]efendant cannot shift

its burden onto applicant by requiring a new Request for Authorization and starting the process over again." (Report, at p. 14; see also *Patterson, supra*, 79 Cal.Comp.Cases 910, 918.)

We further agree with the WCJ's observation that "the mere passage of time or the existence of UR determinations obtained in violation of *Patterson* are not by themselves proof of a change in circumstances." (Report, at p. 11.) The WCJ notes that "[d]ue to the ongoing nature of the home assistance required by Ms. McFall, once it was authorized, the defendants were not entitled to unilaterally terminate her home health care services without evidence of a change in her condition or circumstances to indicate that the home care services were no longer reasonably required." (*Id.* at p. 14.) This is because "where circumstances and needs have not changed after the specified number of weeks, it makes no sense to re-submit essentially the same facts to a new utilization review determination to see if a different reviewer will reach a diametrically opposed conclusion. Such an approach, interrupting care of an ongoing nature every few weeks in order to take repeated bites at the same proverbial apple, does not serve the state constitutional mandate that the workers' compensation system 'accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.'" (*Id.* at p. 15, citing Cal. Const., Art. XIV, § 4.)

We will deny the Petition, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2024

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

ANIKA MCFALL
LAW OFFICE OF ANTHONY CHOE
WAI & CONNOR

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendants ADT Services System, LLC and Old Republic Insurance Company, administered by Gallagher Bassett Services, have through their counsel of record filed a timely, verified petition for reconsideration of the August 9, 2024 Findings and Order Re: Medical Treatment, which found that the reasoning in the *Patterson* significant panel decision *(Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910), applies to applicant Anika McFall's previously authorized assistance in the home, that the discontinuation of caregiving services in this case was a termination of services contrary to *Patterson,* that the caregiving services in this case are not subject to the UR process until a change in circumstances showing that the services are no longer reasonably required, and that it is defendant's, not applicant's, burden to prove such a change of circumstances, consistent with *Patterson.* The decision ordered that defendants reinstate and continue to provide to Ms. McFall a home health caregiver for 8 hours per day, as authorized on January 17, 2024 and certified by UR on January 19, 2024, until a change in circumstances can be shown. The opinion explained that the mere passage of time or the existence of UR determinations obtained in violation of *Patterson* are not by themselves proof of a change in circumstances, and suggested that a future expedited hearing may be requested by defendant for the purpose of further adjudicating whether there has been a change in circumstances at any point where there is new evidence.

The petition, dated September 4, 2024, contends that the undersigned acted without or in excess of his power in making the decision, and that the evidence presented at trial does not justify the findings and order. More specifically, defendants make three arguments in their petition: (1) *Patterson* did not apply to applicant's homecare services, which were limited in frequency and scope and were therefore not ongoing; (2) the Workers' Compensation Appeals Board (WCAB) has no jurisdiction to address the issue of home health care outside of utilization review; and (3) if the WCAB had jurisdiction, the Medical Treatment Utilization Schedule (MTUS) should be applied to the request to continue applicant's homecare.

Applicant's counsel filed an answer to the petition, dated September 16, 2024. The answer asserts that *Patterson* does apply to applicant's home health care services, and makes a distinction

between the present case and a case relied upon by defendants; *Romo v. Pacific Bell Tel. Co.,* 2019 Cal. Wrk. Comp. P.D. LEXIS 525, insofar as in *Romo* the parties had entered a stipulation to provide a certain amount of care.

II

FACTS

Based on the parties' stipulations at trial, it is found that Anika McFall, while employed on February 1, 2016, at age 44, as a sales account manager, at Chatsworth, California by ADT, sustained injury arising out of and in the course of employment to her back, right shoulder; and claims to have sustained injury arising out of and the course of employment to her head, neck, psyche, sleep disorder, right lower extremity, respiratory system, and chronic pain; at the time of injury, the employer's workers' compensation earner was Old Republic Insurance Company, administered by Gallagher Bassett; the employer has furnished some medical treatment (Minutes of Hearing and Summary of Evidence dated 5/30/2024, p. 2, l. 3-11).

At trial, the parties also stipulated that some caregiving services were provided in the calendar year 2023, but as of the trial date, care giving services had been discontinued. Additional stipulations included that no attorney fees have been paid and no attorney fee arrangements have been made, that in the event that Dr. ltamura's deposition goes forward prior to trial (which it did), the deposition transcript can be used (which it was), and that the Pre-Trial Conference Statement may be revised, as necessary, up until trial. *(Id.,* p. 2, l. 11-17 and p. 3, l. 1-2).

The issues submitted for decision at trial were need for further medical treatment, and specifically, continuity of care per the *Patterson* case *(Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910), and ongoing need for a caregiver. Defendants contend that the *Patterson* case does not apply, and that there has been no termination of caregiving services. Defendants further contend that all caregiving services are subject to the RFA/UR/IMR processes, and that it is applicant's burden to prove medical necessity in the event of a denial. *(Id.,* p. 2, l. 18-25).

Both exhibits and applicant's testimony were taken at trial. Admitted over objection as Applicant's Exhibit 1 were various photographs taken by the applicant, which were authenticated and discussed in the course of her testimony, which was summarized in the Minutes of Hearing and Summary of Evidence (MOH/SOE) and was repeated in the opinion on decision *(Id.,* p. 3, l. 5-7 and pp. 4-7).

Admitted as Joint Exhibit 1 was Gallagher Bassett's correspondence to John Itamura, M.D., dated January 17, 2024, stating: "This authorizes a caregiver for 8 hours per day for 2 weeks. Authorization expires 02/02/24." This authorization seems to match the utilization review (UR) determination of January 19, 2024 that certified home health care of 8 hours per day for two weeks as reasonable and necessary, which was admitted as Joint Exhibit 5. *(Id.,* p. 3, l. 7-9 and 17-19).

Joint Exhibits 2 through 11 are inconsistent UR determinations, together with related Forms RFA and reports. Admitted as Joint Exhibit 2 was a UR determination, including report and RF A, dated January 3, 2024, certifying everything requested by Dr. Itamura except home health care of 4 days per week, 8 hours per day, and post-operative durable medical equipment (DME). Admitted as Joint Exhibit 3 was a UR determination, including report and RF A, dated January 8, 2024, once again deciding that home health care, specified as 4 days per week, 8 hours per day, for four weeks, should not be authorized. Admitted as Joint Exhibit 4 was a UR determination including report and RF A, dated January 11, 2024, once again deciding that home health care should not be authorized. As mentioned above, admitted as Joint Exhibit 5 was a UR determination, including report and RFA, dated January 19, 2024, this time certifying home health care 8 hours per day for two weeks. *(Id.,* p. 3, l. 10-19).

Admitted as Joint Exhibit 6 was a UR determination, including report and RFA, dated January 24, 2024, certifying home health L VN services 4 days per week, 8 hours per day, for 4 weeks, modifying a request for a caregiver 8 hours per day for 45 days. Admitted as Joint Exhibit 7 was a UR determination, including report and RF A, dated February 2, 2024, non-certifying home health care for 4 days per week, 8 hours per day. Admitted as Joint Exhibit 8 was a UR determination, including report and RF A, dated March 8, 2024, again non-certifying a request for home health care of 4 days per week, 8 hours per day, and also non-certifying physical therapy. Admitted as Joint Exhibit 9 was a UR determination, including report and RF A, dated March 27, 2024, non-certifying a request for home health care of 10-12 hours per day for 3 months. Admitted as Joint Exhibit 10 was a UR determination, including report and RF A, dated April 10, 2024, non-certifying a request for home health care of 4 days per week, 8 hours per day, for 4 weeks. Admitted as Joint Exhibit 11 was a UR determination, including report and RF A, dated April 11, 2024, also non-certifying a request for home health care of 4 days per week, 8 hours per day. *(Id.,* pp. 3-4).

Admitted as Joint Exhibit 12 was the deposition of John Itamura, M.D., dated April 17, 2024. *(Id.,* p. 4, l. 11-12). A summary of salient points made by Dr. Itamura at the deposition are as follows. Dr. Itamura testified that overall, he found Ms. McFall to be a credible person *(Id.,* p. 8, l. 11-12). He performed multiple surgeries on her. The first one was a revision surgery around March 25, 2021, changing out cerclage wire for plastic. The next surgery was another revision, to replace a humeral implant which seemed to be causing an allergic reaction. Unfortunately, Ms. McFall had an allergic reaction to the Dermabond that was used to close the skin after this operation, so a third surgery was performed to remove the skin edges. A fourth surgery was done on January 4, 2024, after two motor vehicle collisions broke Ms. McFall's humerus underneath her prosthesis. Dr. Itamura had to cut all the way down to Ms. McFall's bone to remove sutures. Because Ms. McFall had positive bacteria cultures, and infectious disease specialist named Dr. Byron Williams stared her on intravenous antibiotics. She was in the hospital for 19 days, and went home with a PICC line, so she needed someone to administer intravenous antibiotics and help with activities such as cooking and driving. Dr. ltamura recalled that there "was a big issue on arranging home health and transportation and it was a mess" (Deposition of Dr. Itamura 4/17/2024, p. 12, l. 5-6), but he believes "eventually all that stuff was set up" *(Id.,* p. 16, l. 19-20). Then, "at least on my last visit, she didn't have any caregiving so she said her trash was piling up inside her house" *(Id.,* p. 17, l. 11-13). When asked how her right shoulder is doing post-surgery, Dr. Itamura said it was "not making as robust gains as I'd like, but she's definitely not regressing in my mind" *(Id.,* p. 20, l. 8-10). Dr. ltamura believes Ms. McFall had foot surgery with Dr. Eric Tang at USC since the January 4, 2024 surgery, but he isn't sure exactly what the nature of this surgery was. Dr. ltamura's indication in March 2024 that Ms. McFall is denying difficulties with strength, dexterity, and sensation was with respect to hand function, not shoulder function *(Id.,* p. 29, l. 18-25 and p. 30, l. 5-9). At that particular evaluation, he did not perform a physical examination of the shoulder because she didn't move her arm, but at some of his other evaluations he performed physical examinations of the shoulder *(Id.,* p. 30, l. 1-4 and 12-16). The last time he evaluated her shoulder was roughly two weeks before the deposition *(Id.,* p. 30, l. 12-21). Ms. McFall will never return to l00 percent of her preinjury capacity *(Id., p.* 51, l. 6-13). However, he would think that she is going to reach a plateau six or seven months after surgery *(Id.,* p. 32, l. 1722).

Dr. Itamura testified that he would defer to a hematologist regarding what caused Ms. McFall's pulmonary embolus, but his own "guess" would be that it is from her foot surgery *(Id.,* p. 25, l. 19). Dr. ltamura indicated that taking the trash out is probably difficult for Ms. McFall because of both her shoulder and her foot *(Id.,* p. 36, l. 14-18). His goal for her is for her to eventually be able to drive again *(Id.,* p. 20, l. 13-17). Ms. McFall continues to need home healthcare at this point "until she becomes more independent" *(Id.,* p. 4 7, l. 18-23). Dr. Itamura agreed that Ms. McFall would need help with laundry, meal prep, picking up pots and pans, washing dishes, shopping for groceries, picking up bags, bringing them upstairs to her apartment, and shelving things *(Id.,* p. 48, l. 1-19). He thinks that activities like bathing, getting dressed, and personal hygiene are not easy for Ms. McFall, but he does not know how difficult they are, and he agreed that they support his opinion that she needs at least some level of home healthcare from an orthopedic standpoint *(Id.,* p. 48, l. 20-25). At the deposition it was still Dr. Itamura's opinion that Ms. McFall requires home healthcare of eight hours per day *(Id.,* p. 50, l. 22 through p. 51, l. 5).

According to Dr. ltamura's testimony, they sent Ms. McFall for a leukocyte transformation test. He agreed that it is unusual to be allergic to so many things. He doesn't think this kind of testing needs to be repeated. He had Ms. McFall see Dr. Lee Squitieri, a board-certified plastic surgeon, regarding her scarring *(Id.,* p. 56, l. 5-10). Strengthening through appropriate physical therapy may help Ms. McFall to recover, and she may require more than 24 sessions of physical therapy. The key will be deltoid strengthening, getting biceps, triceps, and periscapular muscles stronger, he thinks *(Id.,* pp. 54-55).

At trial applicant Anika McFall was called as a witness and testified that had an injury on the job in 2016, a car accident. She had seven surgeries for this injury, and the most recent was in May of 2024. She received caregiving services for the first time in December of 2019. Then she received caregiving services briefly in March of 2021, as well as from December 2022 to January 4, 2024. After January 4, 2024, she received care on and off, but was denied care on the date of her surgery. She spent three or four days in the hospital. Later, a home health nurse was approved when an infection occurred. *(Id.,* p. 4, l. 18-23).

Ms. McFall recalls that she was provided home care after she was hospitalized for 25 days with a PICC line. She spent six days in the hospital the year before that. She was told that defendants would provide care for her for two weeks, and her former attorney said to just take the offer. Then they said they would provide her with four weeks of care, but this made no sense

because she had a nurse approved for six weeks. She wondered, why would she have a caregiver for only four weeks when she had a nurse authorized for six weeks? This didn't make sense to her. *(Id.,* p. 5, l. 1-5).

Ms. McFall testified that she had blood clots in her lungs from the surgery. She is on Eliquis. From January 2023 to January 2024, she had caregiving services to assist her with bathing, meals, grooming (she cannot reach overhead to do her hair), cleaning, laundry, driving, and companionship because she is depressed. Since January of 2023, Ms. McFall has had a total shoulder replacement, a revision surgery, an ablation, and a device was installed to which she was allergic, so they had to take the device out. She also had a scalene block, she thinks. She had multiple neuromas. This was excruciating for Ms. McFall. *(Id.,* p. 5, l. 6-11).

Ms. McFall authenticated and discussed the photographs that were admitted into evidence as Applicant's Exhibit 1. The first photo is a picture of the outdoor stairs to her townhome. The second one is of a kitchen upper cabinet. She broke two bowls trying to pull stuff down from the shelf. She also broke glasses and a plate. The third photograph is of a trash can and bags around it. She did not want roaches. It triggers her and makes her angry to think about this situation. *(Id.,* p. 5, l. 12-16).

Ms. McFall testified that she has difficulty with stairs. She has been using crutches and a wheelchair. She has had to urinate without making it to the bathroom in time. She has had difficulty holding the rail while using the stairs, because she is usually in a full brace. She is lethargic from medication and has dizziness. This got worse after her blood clots. *(Id.,* p. 5, l. 16-19).

Ms. McFall's recalls that procedures were performed mainly on her right arm, shoulder, and back (in the scapular area). She is right-handed. She can't do normal everyday things like cut things or use heavy cast-iron pots. This is difficult for her, especially after her surgeries. She was always athletic. Ms. McFall admits that she is defiant and tests the threshold of what she can do. This is not going well. Recently she has the same limitations in her activities of daily living, but she is having a more difficult time doing activities. For example, she can't clean the tub anymore. Intricate movements hurt really bad, such as typing on a computer. Doing her hair is difficult. She has braids, but this doesn't help her very much. Bathing is also difficult for her. She wasn't supposed to get the PICC line wet. *(Id.,* p. 5, l. 16 through p. 6, l. 5).

Ms. McFall showed the Court how she currently has a heavy scar down her entire right upper arm. She has asked for a plastic surgeon because she had keloids. She is in excruciating pain

and cannot sleep. She did a sleep study. They diagnosed her with insomnia and told her that she slept for only 52 minutes per night. The defendants did not find her a cognitive sleep therapist. Ms. McFall is angry, irritable, and discombobulated. She is not healing properly. She said that she was about ready to drive to Rancho Cucamonga to show the claims adjuster her scars. She got along with the claims adjuster until they got an attorney. Ms. McFall studied the law and thinks that the defendants have given her a hard time. When they got an attorney, it was like he thought that she was trying to take advantage of the system. On the contrary, she was trying to cooperate. She wishes now that she had not told them when she thought she saw some improvement, because now she cannot get care when she really needs it. The adjuster should have known that she couldn't bounce back from her sixth surgery. The defense attorney says that she doesn't look like she needs help. She does not look how she feels. Ms. McFall added that she has not been paid mileage since 2018. She confirmed, again, that she has the same limitations as last year, but now they are to a greater extent. *(Id.,* p. 6, l. 6-18).

Upon cross-examination, Ms. McFall testified that she believes she had blood clots from her shoulder surgery. She was told this by doctors at Providence and Cedars-Sinai. Dr. Itamura and Dr. Williams (an infectious disease doctor, not Vernon Williams) told her this, as well as multiple doctors at the hospital. Ms. McFall is aware that Dr. Itamura's deposition was taken, but she did not read the transcript. Ms. McFall requested an angiogram and cardiogram to check her legs and shoulders. The defense refused to authorize her Eliquis, and she believes that this refusal was life-threatening. When she spoke with a doctor about it, he said that the blood clots could have come from her shoulder surgery, but she is not sure whether that was his medical specialty. *(Id.,* p. 6, l. 20 through p. 7, l. 4).

Ms. McFall has used crutches and a wheelchair because she had bone spurs on her feet. She was discharged from the hospital with a wheelchair. They offered it, and she took it. She needed crutches initially to go up and down stairs, but she was told that this is dangerous. It was recommended that she move to a skilled nursing facility. She had surgery to remove bone spurs on February 16, 2024. She was discharged with orders that did not include home healthcare services, because the bone spur surgery was not that serious. However, she was prescribed physical therapy. They also recommended a skilled nursing facility for her, but she didn't want to go. *(Id.,* p. 7, l. 5-10).

Ms. McFall said that doesn't have her medical records from Keck USC hospital, but she probably has discharge instructions in a stack of papers somewhere. They recommended that she receive a home nurse visit from Americare and physical therapy. This is still the case, but she is not with Americare anymore. Now she is with a company called "At Ease." Ms. McFall had a sleep study and was authorized to see a physician. She went to Advanced Sleep Medicine and saw Dr. Ishaaya. He referred her to intensive cognitive behavioral therapy for sleep, which was authorized. Ms. McFall believes Aaron has tasked Cheryl with finding a physician or therapist for her. She thought that she was getting about three hours of sleep per night, but she was told that, in fact, she sleeps only 52 minutes a night. *(Id.,* p. 7, l. 11-18).

Upon redirect examination, Ms. McFall testified that she does not use any assisted devices for walking today. Her right arm and mental health are her main concerns, although her left arm is also affected. Ms. McFall complained that bills for multiple car accidents have not been paid by the defendants.

Based on the foregoing, a Findings and Award Re: Medical Treatment was issued on August 9, 2024 and served on interested parties on August 12, 2024. That decision found that the reasoning in the *Patterson* significant panel decision *(Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910), applies to applicant Anika McFall's previously authorized assistance in the home, that the discontinuation of caregiving services in this case was a termination of services contrary to *Patterson,* that the caregiving services in this case are not subject to the UR process until a change in circumstances showing that the services are no longer reasonably required, and that it is defendant's, not applicant's, burden to prove such a change of circumstances, consistent with *Patterson.* The decision included an order that defendants reinstate and continue to provide to Ms. McFall a home health caregiver for 8 hours per day, as authorized on January 17, 2024 and certified by UR on January 19, 2024, until a change in circumstances can be shown. The opinion explained that the mere passage oftime or the existence of UR determinations obtained in violation of *Patterson* are not by themselves proof of a change in circumstances, and suggested that a future expedited hearing may be requested by defendant for the purpose of further adjudicating whether there has been a change in circumstances at any point where there is new evidence (Findings and Order Re: Medical Treatment dated 8/9/2024, p. 16, para. 2).

Defendants ADT Services System, LLC and Old Republic Insurance Company, administered by Gallagher Bassett Services, have through their counsel of record filed a timely,

verified petition for reconsideration of the August 9, 2024 Findings and Order Re: Medical Treatment. The petition contends that the undersigned acted without or in excess of his power in making the decision, and that the evidence presented at trial does not justify the findings and order. More specifically, defendants make three arguments in their petition: (1) *Patterson* did not apply to applicant's homecare services, which were limited in frequency and scope and were therefore not ongoing; (2) the Workers' Compensation Appeals Board (WCAB) has no jurisdiction to address the issue of home health care outside of utilization review; and (3) if the WCAB had jurisdiction, the Medical Treatment Utilization Schedule (MTUS) should be applied to the request to continue applicant's homecare.

III
DISCUSSION

Based on the documentary evidence and testimony summarized above to current law regarding medical treatment in California workers' compensation cases, it appears that the reasoning of the significant panel decision in *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910 does apply to the kind of assistive unskilled home caregiving that was requested for Ms. McFall by Dr. Itamura. This care was authorized on a limited basis by defendants as shown in Joint Exhibit 1 ("This authorizes a caregiver for 8 hours per day for 2 weeks. Authorization expires 02/02/24"). The legal question is whether such care may be ceased based upon preordained time limits or inconsistent utilization review without first showing that the care is no longer needed.

In the *Patterson* case, an Appeals Board panel held that (1) the provision of a nurse case manager is a form of medical treatment under Labor Code § 4600, (2) an employer may not unilaterally cease to provide approved nurse case manager services when there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury, (3) use of an expedited hearing to address the medical treatment issue in this case is expressly authorized by Labor Code§ 5502(b)(l), and (4) it is not necessary for an injured worker to obtain a Request For Authorization (RF A) to challenge the unilateral termination of the services of a nurse case manager. *(Patterson,* cited *supra,* 79 Cal. Comp. Cases 910, 911-912.)

The reasoning applied to nurse case manager services in *Patterson* has also been applied to home care services, which also constitute medical treatment. In the case of *Warner Brothers v. Workers' Comp. Appeals Bd. (Ferrona)* (2015) 80 Cal. Comp. Cases 831, 832-834 (writ denied),

an Appeals Board panel affirmed the trial judge's finding that the reasoning in *Patterson* applies to assistive home care. In the *Ferrona* case, the injured worker sustained a cumulative industrial injury to her psyche and in the form of fibromyalgia, and was prescribed home health care services 24 hours per day, seven days per week by her treating physician. In 2009, the employer had agreed to provide home care services 24 hours per day, seven days per week, and had voluntarily provided caregiving services in the home again in 2014 after the treating physician submitted his request for authorization indicating the employee's continued need for home health care. The Board found that the employer's UR denial of Dr. Glaser's subsequent request for authorization was moot because the employer had already certified home health care, and pursuant to *Patterson,* cited above, the employer was not entitled to unilaterally terminate the employee's home health care services without evidence of a change in the employee's condition or circumstances to indicate that the home care services were no longer reasonably required to cure or relieve from the effects of the industrial injury. The Appeals Board held that Labor Code *§* 4600(h) did not require the employee to submit a new prescription for each period of requested home health care services. *(Ferrona,* cited *supra,* 80 Cal. Comp. Cases 831, 832-834 (writ denied); *see also* Hanna, 1 CA Law of Employee Injuries & Workers' Comp§ 5.02 (2024).)

Although the level of home care in this case is only eight hours and not 24 hours per day as it was in the *Ferrona* case, it is the same type of home assistance, and the principles are the same. Due to the ongoing nature of the home assistance required by Ms. McFall, once it was authorized, the defendants were not entitled to unilaterally terminate her home health care services without evidence of a change in her condition or circumstances to indicate that the home care services were no longer reasonably required. Just as in the writ denied *Ferrona* case, cited above, which found the need for ongoing home care to be analogous to the need for ongoing nurse case manager services, the undersigned finds that the reasoning in *Patterson* does apply to Ms. McFall's case. The *Patterson* doctrine, requiring a change in circumstances to revisit utilization review after authorization of ongoing services, ensures that care of an ongoing nature is not interrupted by inconsistent UR determinations. Once such treatment of an ongoing nature was authorized in this case, applicant was not obligated to repeatedly prove that the care continued to be reasonable and necessary. Instead, once defendants authorized Ms. McFall's home caregiver services as reasonable medical treatment, it became obligated to continue to provide those services until the defendants could show that such services are no longer reasonably required under Labor Code

§ 4600 to cure or relieve the effects of the industrial injury. Following the reasoning in *Patterson,* it is found that it is defendants' burden to show that the continued provision of the services is no longer reasonably required due to a change in applicant's condition or circumstances. Defendants cannot shift this burden onto applicant by requiring a new RF A to start the UR process over again, reassessing reasonableness and necessity without any change of circumstances. Inconsistency of UR determinations is a risk inherent in the system, but this risk can be avoided by applying the *Patterson* doctrine. Because each UR determination is written by a different doctor, different results can be obtained on substantially the same record. That is exactly what happened in this case: home care services were certified as reasonable and necessary by UR physician Hark Hsiao. M.D. in Joint Exhibit 5 and Richard Matza, M.D. in Joint Exhibit 6, but non-certified as not reasonable and necessary by Hilary Alpert, M.D. in Joint Exhibit 4 and Chintan Sampat, M.D. in Joint Exhibit 7. This kind of arbitrary inconsistency is not only bad [for] the injured worker's health, but also for the integrity of the whole system.

The *Romo* panel decision, cited above, actually affirmed the applicability of the reasoning in *Paterson* to home health care in general, but returned that case to the trial level to develop the record to determine whether the parties had agreed to an indeterminate amount of care or had placed limitations on that care such that the agreement of the parties removed the case from the reasoning in *Patterson.* Applicant's answer to the petition for reconsideration correctly notes that the distinguishing feature is the intent of an agreement and not a limitation on the reasoning in *Patterson* where a number of weeks are specified, as they typically are in a Request for Authorization. Where circumstances and needs have not changed after the specified number of weeks, it makes no sense to re-submit essentially the same facts to a new utilization review determination to see if a different reviewer will reach a diametrically opposed conclusion. Such an approach, interrupting care of an ongoing nature every few weeks in order to take repeated bites at the same proverbial apple, does not serve the state constitutional mandate that the workers' compensation system "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character" (Cal Const, Art. XIV § 4).

The undersigned respectfully disagrees with defendants that an unfavorable redundant UR determination provides the requisite "change in circumstances" to terminate care under *Patterson,* or that discontinuation of services does not constitute a termination of care. The point of *Patterson* is to ensure that care of an ongoing nature is not interrupted by inconsistent UR determinations,

and *Patterson* does this by holding that repeated RF As and UR for such ongoing care is not appropriate until defendants have proven a change in circumstances. To follow an inconsistent UR determination that was obtained in contravention of the holding in *Patterson* is entirely inconsistent with the *Patterson* doctrine. The same would be true if any fixed time limitations, such as two weeks or four weeks, were mechanically applied to cease ongoing care otherwise governed by the reasoning in the *Patterson* case, without showing a change in circumstances. Although *Patterson* is not a binding en bane decision, it is a significant panel decision, meaning that it has been identified for dissemination by the Workers' Compensation Appeals Board in order to address new or recurring issues of importance to the workers' compensation community. Significant panel decisions, including *Patterson,* have been reviewed by each of the WCAB commissioners, who agree that the decision merits general dissemination. It appears that the Appeals Board has consistently applied the reasoning in *Patterson* to home care services, and defendants' arguments to abandon the *Patterson* doctrine and start doing the opposite, i.e., allow repeated and inconsistent UR determinations to switch caregiving on and off every 45 days, or even every two or four weeks-would represent a change in how such cases are currently being handled by the Appeals Board, and undermine the stated mission and purpose of the workers' compensation system, as noted above.

The *Patterson* approach to ongoing care issues does not confer jurisdiction upon the WCAB over the determination of reasonableness and necessity of specific treatment requests. It relies upon the continued application of wither a certification of treatment by a utilization review determination that applies the Medical Treatment Utilization Schedule, or upon the defendants' concession that such services are reasonable and necessary by actually providing the services, since defendants are not required to deny treatment that has been non-certified by utilization review.

It is understandable why defendants would be concerned about the open-endedness of ongoing treatment under *Patterson.* However, the *Patterson* doctrine does not apply to all kinds of treatment. For example, *Patterson* does not apply to prescription medications because they, by their nature, are subject to ongoing evaluation to address their efficacy and necessity. Additionally, open-ended treatment that does fall under *Patterson,* such as the home assistance provided to Ms. McFall, can be properly reviewed and ended, as long as the defendant can meet its burden to show

a change in circumstances. At his deposition, Dr. ltamura promised to inform the parties when this happens:

> Q. Okay. And so you'll let the parties know when you believe Miss McFall is able to engage in independent living and no longer needs home healthcare, correct?
> A. Correct.
>
> (Deposition of Dr. ltamura 4/17/2024, p. 49, l. 22-25.)

There is no evidence that Dr. Itamura has informed the parties that Ms. McFall no longer needs home healthcare. Accordingly, the evidence and applicable legal considerations support the finding that the *Patterson* case applies to Ms. McFall's previously authorized assistance in the home, that the discontinuation of caregiving services in this case was a termination of services contrary to *Patterson,* that the caregiving services in this case are not subject to the UR process until a change in circumstances showing that the services are no longer reasonably required, and that it is defendant's, not applicant's, burden to prove such a change of circumstances, consistent with *Patterson,* which has not currently been shown in this case. It was therefore within the undersigned's powers and supported by the evidence to order that defendants reinstate and continue to provide to Ms. McFall a home health caregiver for 8 hours per day, as authorized on January 17, 2024 and certified by UR on January 19, 2024, until a change in circumstances can be shown. The mere passage of time or the existence of UR determinations obtained in violation of *Patterson* are not by themselves proof of a change in circumstances. An expedited hearing may be requested by defendants at any point in the future for the purpose of further adjudicating whether new evidence constitutes a change in circumstances that warrants a new utilization review determination to continue, modify, or terminate applicant's home health care.

IV
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

DATE: 9/18/2024

CLINT FEDDERSEN
Workers' Compensation
Administrative Law Judge