WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANNA HONG, *Applicant*

vs.

SBC INTERNET SERVICES/PACIFIC BELL; AMERICAN HOME ASSURANCE, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ2419734 (SFO 0504906); ADJ2647713 (SFO 0504908); ADJ292246 (SFO 0505632)
San Francisco District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant in pro per seeks reconsideration of the Joint Findings of Fact issued on August 30, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed by defendant during the periods ending July 19, 2005 (ADJ2419734), July 1, 2004 (ADJ2647713), and April 30, 2008 (ADJ292246), applicant sustained injury arising out of and in the course of her employment to her upper extremities; (2) applicant is entitled to reasonable and necessary medical care to cure or relieve from the effects of her injuries; (3) the holding in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 does not apply to Dr. Leslie Kim's April 19, 2022 request for authorization (RFA) for transcutaneous electrical nerve stimulation (TENS) machine supplies; (4) authorization for TENS machine supplies was timely denied by defendant on the basis of medical necessity; and (5) the WCAB does not have jurisdiction to consider medical necessity of the TENS machine supplies.

Applicant contends that because the TENS treatment was previously authorized by defendant, *Patterson* bars her April 19, 2022 request for that treatment from being subject to review. Applicant further contends that the evidence fails to establish that the treatment is no longer medically necessary.

We received an Answer from defendant.

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[1] Commissioner Palugyai, who was on the panel that granted reconsideration, no longer serves on the Appeals Board, and another panelist has been assigned in her place.

The WCJ issued a Joint 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 upon our review of the record and as discussed below, we will rescind the Joint Findings of Fact and substitute findings that (1) applicant sustained injury arising out of and occurring in the course of her employment to her upper extremities while employed by defendant during the periods ending July 19, 2005 (ADJ2419734), July 1, 2004 (ADJ2647713), and April 30, 2008 (ADJ292246); (2) applicant is entitled to reasonable and necessary medical care to cure or relieve from the effects of these injuries; and (3) defer the issues of (a) whether defendant met its burden of establishing a change of circumstances or condition warranting review of the issue of whether the TENS treatment was no longer medically necessary after the February 13, 2017 TENS treatment authorization; (b) whether any discontinuation of the TENS treatment by defendant was based upon substantial medical evidence showing that the treatment was no longer necessary to cure or relieve applicant from her injury; and, as appropriate (c) whether the WCAB holds jurisdiction to determine the issue of what medical treatment is reasonably required to cure or relieve applicant from the effects of her injury; and (d) whether applicant met her burden of proof of establishing medical necessity of the April 19, 2022 request for TENS treatment; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On June 2, 2022, the matter proceeded to trial as to the issue of "applicant's alleged entitlement to the TENS supplies requested by Dr. Kim." (Verbatim Minutes of Hearing, June 22, 2022, p. 1:43-45.)

The WCJ admitted exhibits entitled "February 13, 2017 Stipulation and Order" and "April 21, 2022 Utilization Review Non-Certification Notice" into evidence. (*Id.*, p.)

The Stipulation and Order states that defendant authorized

> 1) six month supply of TENS Units Supplies/Pads, Batteries, lotio[n]s, alcohol wipes
>
> . . .
>
> Parties agree that this authorization is limited through August 13, 2017 . . . and that any and all future medical treatment is subject to utilization review, independent medical review and all relevant labor code sections. Valid prescription and RFAs necessary.
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> (Ex. E, Order of Judge Succa, February 13, 2017.)

The Utilization Review Non-Certification Notice states:

2. Is the request for TENs Unit w/ Supplies - Bilateral Wrists medically necessary?

The request is not medically necessary.

The request for a TENS unit with provision of associated supplies for the bilateral wrists is not medically necessary. The CA MTUS does not address the topic. However, ODG's Forearm, Hand, and Wrist Chapter TENS topic notes that TENS, the modality in question, is not recommended for the forearm, wrist, or hand, i.e., the implicated body parts. The attending provider failed to furnish a clear or compelling rationale in favor of the decision to employ this treatment option in the face of the unfavorable ODO position on the same. Therefore, the request for TENs Unit w/ Supplies -Bilateral Wrists is not medically necessary.
(Ex. C, Utilization Review Non-Certification Notice, April 21, 2022, pp. 8-9.)

In the Joint Opinion on Decision, the WCJ states:

At issue in this trial was applicant's contention that defendant is precluded from conducting utilization review (UR) of her physician's requests for transcutaneous electrical nerve stimulation ("TENS") machine supplies, which should have been furnished to her as a result. Applicant has a longstanding award of further medical care to the upper extremities, issued jointly as to the three cases involved in this trial (4/26/10 Award issued by the Hon. Richard Newman at EAMS Document ID No. 15188540). Numerous Appeals Board hearings have taken place relating to enforcement of that award, with Ms. Hong representing herself since early 2013 (applicant also received an award against the Subsequent Injuries Benefits Trust Fund in 2011, which is not at issue).

On April 29, 2022, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing (DOR) regarding a medical treatment dispute, wherein she averred as follows (text uncorrected from original here and in all quotations below, unless specifically indicated):

> Defense's requirement of RFA is just a tactic to stop medical treatment in progress without having a legitimate reason based on a medical opinion that treatment is no longer necessary. The medications and supplies were necessary when provided and remained necessary throughout the course of the continued treatment. RFA issued by new PTP for the TENS unit along with supplies and replacement of Thumb Spica Braces was denied. The TENS unit and supplies has been used for over a decade as part of the on-going treatment in progress.

At the resulting hearing on June 22, 2022, the entirety of which was held on the record (see 6/22/22 Minutes of Hearing at EAMS Document ID No. 75688168), it

was ascertained that the only treatment modality allegedly in dispute as of the filing of the DOR that was still germane is the TENS supplies.
. . .
As her first five exhibits, applicant offered single-page excerpts from what appear to be medical-legal reports issued over a 10-year period. None of the reports' authors are identified within the excerpts, but it is apparent that each evaluation involved applicant's industrial injuries and, as discussed below, at least one of the evaluators can be identified through other exhibits. The excerpts will be discussed in chronological order.

The earliest document, found in exhibit 2, is page 18 of a report dated August 29, 2008, containing the following discussion (emphasis removed):

> . . . she is not taking any medications for her problems, nor is she using a TENS unit, simply because she has not had a treating doctor. Furthermore, she does not use her TENS unit because the carrier has not approved purchase of the supplies needed for the TENS unit despite the fact that it was proven that this was helpful in reducing her symptoms. [¶] …the UR physician should have been aware of the fact that this is a mode of treatment that had been utilized with some success in this patient. Consequently, we are not dealing with something new and untried. We are dealing with something tried and true. In my opinion, therefore, regardless of what the ACOEM Guidelines indicate, in this patient, this modality was effective, and, consequently, should be approved.

Based on my review of defendant's exhibit D (see below), I surmise that the report from which exhibit 2 was excerpted came from Joseph Izzo, M.D., who served as an Agreed Medical Evaluator (AME) in this case at the time.

Exhibit 3 comprises page 5 of a report dated February 12, 2010. Based on the formatting, it appears to have the same author as exhibit 2. In relevant part, the physician noted that applicant had been prescribed a TENS unit, which she used daily "when she had the electro patches. . . . Apparently there has been some problem getting timely replacement of the patches from the insurance carrier on occasion. It does not happen all the time, however, when it does she simply has to stop using the TENS unit."

The next document, found in exhibit 4, consists of page 8 of a report issued about two years later, on February 17, 2012. Again, the author is not identified and, this time, the formatting does not match the two documents discussed above. The relevant portions of exhibit 4 are to the effect that applicant was "extremely fearful" of any further surgical intervention and that her primary treating physician prescribed "Lidoderm patch, Voltaren gel and a TENS unit to deal with the symptoms in her upper extremities."

Finally, exhibits 1 and 5 both come from a report dated August 14, 2018, which I attribute to neurosurgery Qualified Medical Evaluator (QME) Jim Anderson, M.D.,

on the basis of exhibit D, *post*. The latter comprises page 7 of that report, which appears to include part of the evaluator's review of treatment records. There is documentation of a January 9, 2018, note from an unknown treating physician: "bilateral wrist pain and hand numbness. Continue lansoprazole …, Dendracin cream …, Voltaren Gel, Lidoderm patches, TENS and NSAIDs." Exhibit 1 consists of page 13 of the report, containing the following text:

> . . . Anna Hong has repetitive strain injuries of both upper extremities resulting in right greater than left carpal tunnel syndromes. She is status post right carpal tunnel release, status post right craniotomy for removal of a meningioma that resulted in a right facial paralysis and loss of hearing in the right ear, status post radiation of residual meningioma and cognitive disorders.
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> . . .
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> In the history in the examination for this report as well as review of the medical records from 2004 to 2018, there is no indication that Anna Hong has had any improvement in her physical abilities since the institution of healthcare provided to her based on Dr. Izzo's 2012 reports. She is able to function with her hands but the muscle strength is considerably less than normal and deteriorates rapidly with repetition of movements and activities and is associated with pain as well. Therefore, there is no change in her medical condition compared to her 2012 status and it is strongly recommended that home health services be continued indefinitely since there is no reason to expect any further improvement at this point in time.

. . .

The first two defense exhibits originate with treating physician Leslie Kim, M.D. Exhibit A comprises a treatment report dated April 13, 2022, wherein Dr. Kim noted, "The patient states that Voltaren gel, lidoderm patches, and TENS unit have been used regularly to maintain higher level of function and adequately control chronic pain. There has been reduction of function and activity without these treatments. RFA will be submitted for prescription refills and supplies." Indeed, exhibit B is a request for authorization from Dr. Kim, dated April 19, 2022, listing two items: (1) braces for both wrists and (2) a TENS unit and supplies.

According to exhibit C, defendant received Dr. Kim's RFA on the day it was issued and, two days later, denied authorization for the TENS unit and supplies on medical necessity grounds.[fn] It appears that applicant sought IMR; although the appeal itself is not in evidence, defense exhibit D contains an IMR cover page referencing a May 13, 2022, assignment and enclosing two medical-legal reports. In the course of the hearing, it came to light that applicant had recently received an IMR final determination letter, which was then admitted as court exhibit X. According to the letter, dated June 17, 2022, the IMR contractor overturned defendant's non-certification of the wrist braces, but upheld the UR decision as to the TENS unit and supplies.

. . .

As defendant's final exhibit, it was granted judicial notice of the Honorable Joan Succa's February 13, 2017, order approving a stipulation entered into by the parties

on that same day. The agreement provided, in part, that defendant would authorize six months' worth of TENS equipment, subject to the following terms: "Parties agree that this authorization is limited through August 13, 2017 and that any and all future medical treatment is subject to utilization review, independent medical review and all relevant labor code sections. Valid prescription and RFAs necessary." (Opinion on Decision, pp. 1-7.)

In the Report, the WCJ states:

The three cases involved in this trial are the subject of a 2010 joint award of further medical care, among other things. Applicant has been unrepresented by counsel since 2013. Earlier this year, she requested an expedited hearing, alleging that defendant wrongfully denied authorization for (1) transcutaneous electrical nerve stimulation ("TENS") equipment and (2) thumb braces. On the day of the hearing, the parties agreed that only the former dispute was still germane.[fn]

. . .

No witnesses were called by either party. As summarized on pages 2-5 of my August 30, 2022, Opinion on Decision (hereinafter "the opinion"), most of the 12 exhibits were medical in nature. Applicant's exhibits 1-5 all consist of single-page excerpts from various medical-legal reports issued between 2008 and 2018. Although they were not identified by author, I surmised that the pages in exhibits 2 and 3 came from Agreed Medical Evaluation reports issued by Joseph Izzo, M.D., in 2008 and 2010. In the earlier excerpt, Dr. Izzo noted that applicant had not been using the TENS unit because the necessary supplies were denied by UR. The AME expressed his opinion that TENS is an effective modality for applicant. Similarly, in the later report, Dr. Izzo wrote that applicant occasionally was unable to obtain "timely replacement of the [TENS] patches" and when this happened, she stopped using the TENS unit. The report from which exhibit 4 was excerpted was issued in 2012 and the unidentified physician documented that applicant's treating physician had prescribed TENS "to deal with the symptoms in her upper extremities."

Applicant's exhibits 1 and 5 are pages 13 and 7, respectively, of an August 14, 2018, Qualified Medical Evaluation report from Jim Anderson, M.D., which was attached to the petition for reconsideration in its entirety (see fn. 1, supra). In the two excerpted pages, Dr. Anderson referenced a January 2018 note that listed TENS among the ongoing recommendations from applicant's treating physician at the time. He also expressed his opinion that applicant's condition had not changed since 2012.

The only recent medical report is found in defendant's exhibit A, consisting of an April 13, 2022, treatment report from Dr. Leslie Kim. He noted that, according to Ms. Hong, she had been using TENS, along with medications, "regularly to maintain higher level of function and adequately control chronic pain." Six days later, Dr. Kim issued a request for authorization (RFA) of a TENS unit and supplies (exhibit B). Exhibit C shows that defendant denied authorization on medical necessity grounds two days later; applicant sought IMR (exhibit D) and, shortly before the trial, the UR decision was upheld as to the TENS equipment (exhibit X).

> Each party also requested judicial notice of EAMS documents relating to earlier hearings in these cases. Applicant's exhibit 6 is part of the minutes of a 2016 status conference during which the matter was taken off calendar and applicant was ordered to attend a medical evaluation. The conference judge wrote in the minutes that defendant was "on notice that medical treatment and medications shall be timely provided." Defendant's exhibit E comprises a 2017 order approving a stipulation between the parties, pursuant to which applicant would receive a six-month supply of TENS equipment. The parties also agreed that "this authorization is limited through August 13, 2017 and that any and all future medical treatment is subject to utilization review, independent medical review and all relevant labor code sections. Valid prescription and RFAs necessary."
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> . . .
>
> The record in this case shows that applicant used TENS at her treating physicians' recommendation at some points between 2008 and 2018. It also shows that authorization for the equipment was denied, at least occasionally, during the same period. The most recent authorized provision of TENS equipment established by the evidence took place in 2017, pursuant to a stipulation (exhibit E) that was expressly limited in time.
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> (Report, pp. 2-5.)

DISCUSSION

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code §§ 5900(a), 5903[2]; Cal. Code Regs., tit. 8, § 10507(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10508.) To be timely, however, a petition for reconsideration must be filed (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656] (*Maranian*); *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Thus, by filing a timely Petition for Reconsideration, applicant has successfully invoked the jurisdiction of the Appeals Board to consider her Petition. Timely petitions for reconsideration filed and received by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition. The exception to this rule is a

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

petition not received by the Appeals Board within 60 days due to irregularities outside the petitioner's control. (See *Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312].) Section 5909 provides that a petition is denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (§ 5909.)[3]

However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].)[4] In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.)

Pursuant to the holding in *Shipley* allowing equitable tolling of the 60-day time period in section 5909 when there has been an error but through no fault of the petitioner, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition, and thereafter issues a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful appellate review.[5] (§§ 5901, 5950, 5952.) This

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[3] The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16] ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision."]; see also Lab. Code, § 5908.5; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893 [35 Cal.Comp.Cases 27].)

[4] Under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court that reviews and decides appeals from decisions issued by workers' compensation administrative law judges, and all decisions of the Appeals Board are final unless appealed to the courts of appeal. (Cal. Const., art. XIV, § 4; §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.) In performing its duties as a court, the Appeals Board is bound by the constitutional mandate that it "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character..." (Cal. Const., Art. XIV, § 4.) Substantial justice requires the Appeals Board to protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

[5] "The purpose of [section 5900] is to allow reconsideration, in the context of a specific, framed challenge, of a matter which has been heard only once previously. [Citations omitted.] The power to reconsider affords the WCAB an

approach is consistent with *Rea* and other California appellate courts,[6] which have consistently followed *Shipley's* lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[7]

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opportunity to review its own decisions and the decisions of the WCJs 'in house,' by applying the Board's administrative expertise to rectify errors, when required, prior to judicial involvement." (*Maranian*, *supra*, 81 Cal.App.4th at p. 1074.) Thus, meaningful review by the Appeals Board of factual determinations made at the trial level affords the parties essential due process because an appellate court considering a petition for writ of review of a decision of the Appeals Board may not reweigh the evidence or decide disputed questions of fact. (Lab. Code, § 5952.) Rather, the appellate courts must determine whether the evidence, when viewed in light of the entire record, supports the award of the WCAB. (*Keulen v. Workers Compensation Appeals Bd.* (1998) 66 Cal.App.4th 1089, 1095-1096 [63 Cal.Comp.Cases 1125].

[6] See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. W.C.A.B.* (*Lopez, Leonel*; *Sablan, Yolanda*) (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd*. (*Bernstein*) (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of Californi*a (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v. Workers' Compensation Appeals Board. et al.* (*Lomeli*) (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Compensation Appeals Board et al*. (*Melendez Banegas*) (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al.* (*Haynes*) (2022) 87 Cal.Comp.Cases 905).

[7] The holding in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 (*Zurich*) is not inconsistent with *Shipley* and other California Appellate Court precedent concurring and/or affirming the finding in *Shipley* that equitable considerations may exist to toll the 60-day time limit of Labor Code section 5909. Indeed, the *Zurich* Court expressly declined to "resolve" the question of whether Labor Code section 5909 was intended to be "mandatory and jurisdictional." (*Zurich, supra,* 97 Cal.App.5th at p. 1236, fn. 17.) Under *Zurich*, as in *Shipley*, "equitable considerations" may provide grounds to excuse an action by the Appeals Board outside the 60 days provided for in section 5909. (*Zurich, supra,* 97 Cal.App.5th at p. 1238.) The *Zurich* Court found that the Appeals Board acted "in excess of its jurisdiction," *and* that there were no equitable considerations sufficient enough to toll the time limit in section 5909 beyond 60 days. (*Id.* at p. 1239.)

We note that the *Zurich* Court failed to consider that Labor Code section 5803 provides for continuing jurisdiction by the Appeals Board over all of its "orders, decisions, and awards," and that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board for all proceedings under section 5300. Additionally, jurisdiction is conferred on the Appeals Board when a petition is timely filed under Labor Code section 5900(a), and the Appeals Board may review the entire record, even with respect to issues not raised in the petition for reconsideration before it. A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

In this case, applicant's Petition was filed in EAMS on September 14, 2022 and was timely. However, due to an internal processing error related to the Electronic Adjudication Management System (EAMS) used in the workers' compensation system, the Appeals Board did not receive notice of the Petition until on or about May 24, 2023. Due to this lack of notice, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Therefore, considering that the Petition was timely and that the Appeals Board's failure to act on the Petition was in error, we find that our time to act on applicant's Petition was tolled until 60 days after May 24, 2023, plus an additional day because the sixtieth day for filing fell on a weekend, until July 24, 2023. (Cal. Code Regs., tit. 8, § 10508.) We thus conclude that our Opinion and Order Granting Petition for Reconsideration was timely. Accordingly, we address the merits of the Petition.

Applicant contends that because the TENS machine supplies were previously authorized by defendant, *Patterson* bars her April 19, 2022 request for that treatment from being subject to review.

In *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision),[8] the Appeals Board held that an employer may not unilaterally cease to provide treatment authorized as reasonably required to cure or relieve the effects of industrial injury upon an employee without substantial medical evidence of a change in the employee's circumstances or condition. The panel reasoned:

> Defendant acknowledged the reasonableness and necessity of [the medical treatment at issue] when it first authorized [that treatment], and applicant does not have the burden of proving [its] ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the [treatment] is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization [RFA] and starting the process over again.
> (*Patterson*, *supra*, at p. 918.)

[8] Significant panel decisions are not binding precedent in workers' compensation proceedings. but they are intended to augment the body of binding appellate court and en banc decisions; and, therefore, a panel decision may not be deemed "significant" unless (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

In *Nat'l Cement Co., Inc. v Workers' Comp. Appeals Bd. (Rivota)* (2021) 86 Cal.Comp.Cases 595, the Second District Court of Appeal upheld the Appeals Board's application of *Patterson* to award an applicant continued inpatient care at Casa Colina, stating:

> [T]he principles advanced in [*Patterson*] apply to other medical treatment modalities as well. Here . . . Applicant had continued need for placement at Casa Colina. Further, [applicant's witness] stated that there was no change in Applicant's circumstance and no reasonable basis to discharge Applicant from care. The WCJ . . . concluded that Applicant's continued care at Casa Colina was necessary, without ongoing RFAs, to ensure Applicant's safety and provide him with a stable living situation and uninterrupted medical treatment.
> (*Rivota*, *supra*, at p. 597.)

In upholding this application of *Patterson*, the *Rivota* court rejected the employer's attempt to distinguish it on the grounds that it had never authorized inpatient care for an unlimited or ongoing period, never relinquished its right to conduct UR, and never been subject to a finding that inpatient treatment was reasonable and necessary for the applicant under section 4600. (*Id*.)

Here, the record shows that applicant received the TENS treatment at the request of various treating physicians from 2008 to 2018, though authorization (and treatment) was denied on occasion. (Report, p. 5.) On February 13, 2017, defendant authorized a "six month supply of TENS Units" with a proviso that the "authorization is limited through August 13, 2017 . . . and any and all future medical treatment is subject to utilization review, independent medical review and all relevant labor code sections." (Ex. E, Order of Judge Succa, February 13, 2017.)

The record further shows that on August 14, 2018, the QME in neurosurgery, Dr. Anderson, opined that there had been "no change in her medical condition compared to her 2012 status and . . . that home health services [should] be continued indefinitely"; that Dr. Kim sought reauthorization for the TENS treatment by way of the April 19, 2022 RFA; and that the RFA was referred to UR, where it was denied on the grounds that Dr. Kim had not "furnish[ed] a clear or compelling rationale" for its medical necessity. (Opinion on Decision, p. 4; Ex. C, Utilization Review Non-Certification Notice, pp. 8-9.)

Based upon the February 13, 2017 Stipulation and Order authorizing the TENS treatment for six months; the medical record showing that the treatment was denied on occasion from 2008 to 2018; Dr. Anderson's August 14, 2018 reporting that applicant's condition had not changed and that the treatment should be continued indefinitely; and Dr. Kim's April 19, 2022 RFA for that same treatment, the record suggests that defendant may have ceased providing the treatment on

one or more occasions between August 13, 2017 and April 19, 2022 without establishing grounds for review of its medical necessity and/or substantial medical evidence supporting its discontinuation.

Specifically, we have explained that under *Patterson* and *Rivota,* an employer may not act unilaterally to cease providing ongoing, previously-authorized treatment, including in cases where any time-limitations attached to the authorization may have expired. (See *Rivota*, *supra*, at p. 597.) Rather, it is necessary for the employer to establish the occurrence of a change of circumstances or condition which may warrant discontinuation of the treatment in order for the issue of the medical necessity of the treatment to be subject to review.

Since the record before us fails to show that defendant met its burden of establishing a change of circumstances or condition that could give rise to review of the issue of whether the treatment was no longer medically necessary, and since we have explained that the attachment of a time-limitation to the treatment authorization does not shift the burden of proving the medical necessity of ongoing, previously authorized treatment back to applicant, the WCJ's conclusion that the treatment was properly subject to UR, i.e., that *Patterson* was inapplicable, is without support.[9] (See also *Zepeda v. Starview Adolescent Center* (2022) 87 Cal.Comp.Cases 828 (holding that a physician's request to continue the applicant's previously-authorized inpatient treatment was not subject to UR because there was no substantial medical evidence of change in applicant's circumstances or condition as required by *Patterson*).)[10]

However, in failing to disclose grounds to support the conclusion that the TENS treatment was subject to review and/or discontinuation, the record also fails to reveal the date or dates on which defendant ceased providing the treatment following the February 13, 2017 authorization (and before the April 19, 2022 RFA) or the reasons, if any, therefor. In particular, because there was no witness testimony at trial, we are unable to determine whether defendant's obligation to continue providing the treatment until it met its burden of proving that a change of circumstances or condition warranted a review and determination that the treatment was no longer medically

[9] We note that while the February 13, 2017 Stipulation and Order expressly authorizes TENS treatment for six months subject to applicable laws, it does not purport to waive any of applicant's claims of entitlement to that or any other treatment.

[10] Unlike en banc decisions, panel decisions are not binding precedent on Appeals Board panels. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we may consider these decisions to the extent that we find their reasoning is persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

necessary remained in effect throughout that period, or whether defendant ceased providing the treatment in a manner consistent with the recommendations of applicant's treating physician or otherwise compliant with *Patterson* and *Rivota* and thereby placed the burden of proving medical necessity with applicant.

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

We therefore conclude that the record needs to be developed regarding (1) whether defendant met its burden of establishing a change of circumstances or condition warranting review of the issue of whether the TENS treatment was no longer medically necessary after the February 13, 2017 TENS treatment authorization; (2) whether any discontinuation of the TENS treatment by defendant was based upon substantial medical evidence showing that the treatment was no longer necessary to cure or relieve applicant from her injury; and, as appropriate (3) whether the WCAB holds jurisdiction to determine the issue of what medical treatment is reasonably required to cure or relieve applicant from the effects of her injury; and (4) whether applicant met her burden of proof of establishing medical necessity of the April 19, 2022 request for TENS treatment.

Accordingly, as our Decision After Reconsideration, we will rescind the Joint Findings of Fact and substitute findings that (1) applicant sustained injury arising out of and occurring in the course of her employment to her upper extremities while employed by defendant during the periods ending July 19, 2005 (ADJ2419734), July 1, 2004 (ADJ2647713), and April 30, 2008 (ADJ292246); (2) applicant is entitled to reasonable and necessary medical care to cure or relieve from the effects of these injuries; and (3) defer the issues of (a) whether defendant met its burden of establishing a change of circumstances or condition warranting review of the issue of whether the TENS treatment was no longer medically necessary after the February 13, 2017 TENS treatment authorization; (b) whether any discontinuation of the TENS treatment by defendant was based upon substantial medical evidence showing that the treatment was no longer necessary to cure or relieve applicant from her injury; and, as appropriate (c) whether the WCAB holds jurisdiction to determine the issue of what medical treatment is reasonably required to cure or relieve applicant from the effects of her injury; and (d) whether applicant met her burden of proof

of establishing medical necessity of the April 19, 2022 request for TENS treatment; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact Award and Orders issued on issued on August 30, 2022 is **RESCINDED** and the following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant sustained injury arising out of and occurring in the course of her employment to her upper extremities while employed by defendant during the periods ending July 19, 2005 (ADJ2419734), July 1, 2004 (ADJ2647713), and April 30, 2008 (ADJ292246).

2. Applicant is entitled to reasonable and necessary medical care to cure or relieve from the effects of these injuries.

3. The issues of (1) whether defendant met its burden of establishing a change of circumstances or condition warranting review of the issue of whether the TENS treatment was no longer medically necessary after the February 13, 2017 TENS treatment authorization; (2) whether any discontinuation of the TENS treatment by defendant was based upon substantial medical evidence showing that the treatment was no longer necessary to cure or relieve applicant from her injury; and, as appropriate (3) whether the WCAB holds jurisdiction to determine the issue of what medical treatment is reasonably required to cure or relieve applicant from the effects of applicant's injury; and (4) whether applicant met her burden of proof of establishing medical necessity of the April 19, 2022 request for TENS treatment are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 6, 2024

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

ANNA HONG
YOUNG, COHEN & DURRETT

SRO/*cs*

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