WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ARMANDO SUAREZ, ***Applicant***

vs.

PAYNES JANITORIAL SERVICES INC.; CYPRESS INS. COMPANY, C/O BERKSHIRE HATHAWAY,
Defendants

Adjudication Number: ADJ11347585
San Bernardino District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 10, 2024

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

RMS MEDICAL GROUP
GOLDMAN, MAGDALIN & KRIKES, LLP

LN/pm

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

INTRODUCTION

The lien claimant, RMS Medical, filed a timely, verified Petition for Reconsideration.

STATEMENT OF FACTS

Initially, lien claimant's contention the applicant was awarded $38,911.62 is incorrect. The applicant was awarded 3 percent permanent disability via stipulations with request. The applicant did not receive an award of $38,911.62. (See Petition for Reconsideration after Amended Finding and Order, p. 2, ll. 16)

The Applicant was injured on October 30, 2017. On November 9, 2017, defendant provided the applicant information related to their medical provider network and how to proceed with his claim. The documents in exhibit A were in Spanish and English. The Defendant commenced temporary disability payments on November 15, 2017. The Applicant began medical treatment with Dr. Wang, at Concentra medical on November 10, 2017. Concentra medical is in the defendant's medical provider network. (See exhibit K)

The applicant continued to receive medical treatment at Concentra medical until January 2018. On January 11, 2018, Dr. Wang made a referral to a podiatrist. (See exhibits K, E, G, F, I, J) On March 1, 2018, the applicant was seen by Dr. Haupt, DPM. The applicant was provided treatment with Dr. Haupt through August 23, 2018. (See exhibits L, M, and P) Following treatment with Dr. Haupt, the applicant's care was in transferred to an orthopedic surgeon, Dr. Piasecki. Dr. Gottschalk initially evaluated the applicant on July 17, 2018, while the applicant was still under the care of MPN physician, Dr. Haupt. Dr. Gottschalk evaluated the applicant again on September 4, 2018 while the applicant was waiting to see MPN physician Dr. Piasecki. The applicant received treatment with Dr. Piasecki from October 2, 2018, until he was ultimately determined to be permanent and stationary by Dr. Piasecki on March 29, 2019. (See exhibits O, P, Q, R, S, T, U, and V) The applicant was initially evaluated by panel qualified medical evaluator, Dr. DeSantis, on August 15, 2018. The applicant saw Dr. DeSantis again on May 15, 2019.

An Amended Opinion on Decision, and Findings of Fact issued on February 23, 2024. It is from the Findings and Order that the Lien Claimant now seeks reconsideration.

CONTENTIONS

I. THE WCJ ERRED BY ADMITTING DEFENDANT'S EXHIBITS INTO EVIDENCE

Lien claimant relies on C.C.R 10620 for their position that all defendant's exhibits should have been excluded from evidence. The sole basis for lien claimant's objection to defendant's exhibits was that defendant failed to upload their exhibits in EAMS 20 days prior to trial. The lien representative acknowledged they had previously been served all exhibits offered by the defendant. It did not appear the lien claimant was prejudiced by admitting defendant's exhibits in evidence. Therefore defendant's exhibits were admitted into evidence.

II. THE WCJ ERRED BY FINDING DEFENDANT DID NOT REFUSE OR NEGLECT TO PROVIDE REASONABLE MEDICAL TREATMENT.

It appeared the lien claimant's contention was that because the defendant failed to provide a specific medical treatment protocol, an MRI of the right ankle, the defendant neglected and or refused to provide reasonable medical treatment. Lien claimant also contends that such unreasonable denial of the treatment protocol provided the applicant the opportunity to self- procure medical treatment with a doctor out of the defendant's medical provider network. The lien claimant's contentions are not consistent with the law, or the facts in this case. It appeared the lien claimant conflated the neglect and denial of medical treatment as outlined in *Knight v. United Parcel Service* (2006) 71 C.C.C. 1423, with the denial of a specific treatment protocol through utilization review. As noted in the statement of facts above, the applicant was seen by an MPN provider, 10 days after his injury. The applicant continued to receive treatment with doctors in the defendant's medical provider network until he was found permanent stationary by Dr. Piasecki on March 29, 2019. Clearly, the defendant herein did not deny or refuse to provide medical treatment as discussed in *Knight v. United Parcel Service*.

The defendant may have, via utilization review, denied a medical provider's request for a MRI. However, applicant's remedy for a utilization review denial of a specific treatment protocol was to proceed with independent medical review. The applicant's remedy in this case did not include seeking medical treatment with a non-mpn provider. The determination of reasonable medical treatment, and whether it was necessary, is determined through the utilization review and independent medical review not by a treating physician or a panel qualified medical evaluators. (See Labor Code §4062, 4610, 4610.5)

The lien claimant acknowledged they were not within the defendant's medical provider network. (See petition for petition for reconsideration p. 3 ll. 19) Based on the current record the undersigned found lien claimant is not entitled reimbursement for medical treatment cost.

III. THE WCJ ERRED BY DENING LIEN CLAIMANT REIMBURSEMENT FOR MEDICAL-LEGAL SERVICES

Lien claimant contends that once the applicant's care has been denied they must sustain their burden of proof regarding necessity. Again, as noted above, it appeared lien claimant has conflated neglect or refusal to provide medical treatment as outlined in *Knight v. UPS*, with denial of a specific treatment protocol which is governed by utilization review and independent medical review as outlined in Labor Code §4610, 4610.5. (See Petition for Reconsideration P. 5, ll. 16-17)

In most instances, whether a report prepared by a physician is reimbursable as medical-legal expenses is determined pursuant to Labor Code §4620. Labor Code §4620 states in relevant part:

"(a) For purposes of this article, a medical-legal expense means any cost and expense incurred by or on behalf of any party, … which expense may include … medical reports, … for the purpose of proving, or disproving a contested claim.
(b) A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a claimed industrial injury and one of the following conditions exist:
  (1) The employer rejects liability for a claimed benefit.
  (2) The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim.
  (3) The employer fails to respond to a demand for payment of benefits after the expiration of any time period fixed by statute for the payment of indemnity.
(c) Cost of medical evaluations, diagnostic test, and interpreters incidental to the production of a medical report do not constitute medical-legal expenses, unless

the medical report is capable of proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the employees claim for benefits. … .”

In Dr. Gottschalk’s initial report, see Exhibit 1, under the heading Discussion on page 4 he states “If the carrier has allegedly denied the MRI, it is egregious. … He is due for an MRI, and further evaluation.” Dr. Gottschalk’s medical report does not prove or disprove a disputed medical fact, the determination of which is essential to an adjudication of the applicant’s claim for benefits. Dr. Gottschalk‘s initial report addressed a dispute as to the reasonableness and necessity of medical treatment in the form of an MRI for the applicant’s right foot. Whether a requested medical procedure or protocol is reasonable and necessary is determined by utilization review and independent medical review, not by a treating physician or a panel qualified medical examiner. (See Labor Code §4062, 4610.5, 4610)

Dr. Gottschalk’s second report, (see Exhibit 2) does not address a disputed medical fact. The only disputed issue addressed by Dr. Gottschalk is the reasonableness and necessity of a specific medical treatment, MRI of the applicant’s right foot. Neither of Dr. Gottschalk’s reports address nor is capable of proving or disproving a contested claim, or proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the applicant’s claim for benefits. The only issue Dr. Gottschalk addressed was the need for a specific medical procedure which does not elevate either of his reports to medical-legal per Labor Code §4620. Additionally, Labor Code §4062(b) states “If the employee objects to a decision made pursuant to §4610 to modify, delay, or deny a request for authorization of medical treatment recommendation made by a treating position, the objection shall be resolved only in accordance with independent medical review process established in §4610.5.”

The undersigned did not find either of Dr. Gottschalk’s reports capable of proving or disproving a contested claim as required by Labor Code section 4620. Applicant’s attorney, and now lien claimant who stands in the shoes of the applicant, failed to comply with the mandates of Labor Code §4062(b) to resolve disputes regarding denial of a specific treatment protocol. Therefore, lien claimant is not entitled to reimbursement of medical-legal expenses for the two reports prepared by Dr. Gottschalk. As lien claimant was not entitled to reimbursement for reports prepared by Dr. Gottschalk, they were not entitled to a statutory increase, or interest.

RECOMMENDATION

It is respectfully requested that the Petition for Reconsideration be denied.

Date: March 28, 2024

TRACY L. HUGHES
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE