WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DEBBIE MARKS, *Applicant*

vs.

VERIZON COMMUNICATIONS; NATIONAL UNION FIRE INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ7705066
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Lien claimants Comprehensive Outpatient Surgery Center (COSC) and Marina Russman, M.D., seek reconsideration of the Findings of Fact and Orders issued by the workers' compensation administrative law judge (WCJ) on May 29, 2024. In that decision, the WCJ found that lien claimant COSC's date of service of August 4, 2011 was paid in full on a timely basis, and that the medical treatment services provided by COSC on March 23, 2011 were reasonably required to cure or relieve from the effects of the industrial injury, but that the remainder of lien claimant's unpaid dates of service were not reasonably required. Lien claimant was awarded the sum of $3,646.29 less credit for sums previously paid, plus penalties and interest.

The WCJ further found that lien claimant Marina Russman, M.D., did not provide medical treatment services which were reasonably required to cure or relieve applicant from the effects of the industrial injury, and such services were ordered disallowed.

The WCJ found that defendant engaged in bad faith by failing to pay or object to the services of COSC's services of March 23, 2011, and ordered that defendant Sedgwick Claims Management Services pay sanctions of $500.00 to the appeals board and reasonable costs to lien claimant COSC, in a sum to be adjusted by the parties.

Petitioner COSC contends that the WCJ erred in failing to properly award payment to COSC for services performed on September 8, 201 and September 29, 2011. Petitioner Russman contends that the WCJ erred in disallowing its lien and in finding that the medical treatment

services performed by Dr. Russman were not reasonably required to cure or relieve from the effects of the industrial injury.

Defendant did not file an Answer to the Petition.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition.

We have reviewed the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report.[1]

Based upon our preliminary review of the record, we will grant the lien claimants' Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

PROCEDURAL HISTORY

Applicant, while employed by defendant during the period November 18, 2009 through November 18, 2010, as a customer support analyst, sustained injury arising out of and in the course of her employment to her bilateral shoulders, cervical spine, lumbar spine, bilateral wrists, psyche, and neurological system in the form of headaches, and sleep disorder. Defendant disputed the nature and extent of her injuries, and the matter proceeded to trial on April 30, 2021.

On September 7, 2022, a Findings and Award issued in which applicant was awarded permanent disability of 84 percent as well as future medical treatment for her industrial injuries.

Thereafter, on April 12, 2024, lien claimants COSC and Marina Russman, M.D. proceeded to trial on the issue of their liens for medical treatment and services provided to applicant. The matter was submitted for decision, and on May 29, 2024, the WCJ issued the Findings and Order that is the subject of the petition for reconsideration filed by both lien claimants.

[1] Commissioner Sweeney, who was on the panel that issued a prior decision no longer serves on the Appeals Board. Another panelist has been assigned in her place.

I.

We highlight the following facts and discussion as set forth in the Report of the WCJ that may be relevant to our review of this matter:

> Petitioner, a surgery center, provided medical treatment services to Applicant on 3/23/11, 8/4/11, 9/8/11, and 9/29/11 (Lien Claimant's 1-4). The 3/23/11 date of service, was authorized by Defendant, but not paid (Lien Claimant's 12). The 8/4/11 date of service, which was an epidural injection, was timely paid in full by Defendant (stipulation #2, MOH 4/12/24). Dr. Russman issued reports on 8/8/11 and 9/12/11 wherein second and third epidural injections, which were performed on 9/8/11 and 9/29/11 respectively, were recommended (Lien Claimant's 15 and 14). Both reports were form PR-2 progress reports which left blank the section at the top of the report which is reserved for indicating that a request for authorization was being made (See Title VIII CCR section 9792.6(o)). Those omissions notwithstanding, Dr. Russman also faxed letters on 8/30/11 and 9/21/11 wherein authorization for the respective epidural injections were requested (Lien Claimant's 10 and 9). Neither the reports nor requests for authorization discussed the medical necessity in terms of the Medical Treatment Utilization Schedule (hereinafter MTUS) or otherwise. The evidence does not reflect that either of the authorization requests were submitted to Utilization Review by Defendant.
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> Pursuant to its bill, Petitioner Marina Russman, in addition to conducting an office consultation, administered medical procedures on 8/4/11, 9/8/11, and 9/29/11 (Lien Claimant's exhibit 23). An initial consult took place on 7/11/11 (Lien Claimant's exhibit 16). The report of the same date states that Applicant was referred to Petitioner by the primary treating physician, with no actual physician being identified. The report, which is narrative in nature, does not include the words "Request for Authorization" at the top of the report as required by Title VIII CCR section 9792.6(o), but a request for authorization for the initial cervical steroid injection, as well as injections to both shoulders and supraspinatus was stated in bold type on page 10 of the report. As stated with respect to the lien of Petitioner COSC, Petitioner Russman also issued reports on 8/8/11 and 9/12/11 wherein second and third epidural injections were recommended (Lien Claimant's 15 and 14). Both reports were PR-2 progress reports which left blank the section at the top of the report which is reserved for indicating a section 9792.6(o), request for authorization was being made. A transmission requesting authorization for the initial epidural injection, as well as injections to the shoulders and supraspinatus was faxed to Defendant on 7/27/11 (Lien Claimant's 11). That request was not submitted for utilization review. As stated relative to the lien of Petitioner COSC, Petitioner Russman also faxed letters on 8/30/11 and 9/21/11 wherein authorization for the respective epidural injections were requested (Lien Claimant's 10 and 9).
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Pursuant to Labor Code section 4600(a), the employer shall provide medical treatment that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury. Reasonably required medical treatment is defined in section 4600(b) as treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27, also known at the MTUS. The California Supreme Court decision in SCIF v. WCAB (Sandhagen) (2008) 73 CCC 981 held that a party could not utilize med-legal procedures to dispute a request for medical treatment, but that the parties must avail themselves to the Utilization Review process in accordance with LC section 4610. But in cases where Defendant does not place a Request for Authorization through Utilization Review, the burden of proof regarding the medical necessity of the treatment still falls to Applicant (Dubon v. World Restoration, Inc. (2014) 79 CCC 1298, 1312 (appeals board *en banc*).

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In regards to the charges of Petitioner COSC, there was simply no evidence provided to establish that the epidural injections performed on 9/8/11 and 9/29/11 were in compliance with the MTUS or any scientific medical evidence that establishes a variance from those guidelines. Additionally, the underlying services were provided by Dr. Russman, and it does not appear that her reports were incorporated by the primary treating physician, nor is there any medical documentation justifying the medical necessity of the referral. As such, the medical treatment services provided by COSC were not deemed reasonably required to cure or relieve from the effects of the industrial injury.

As for the charges of Petitioner Russman, it is clear that she is not the primary treating physician. What is not clear is who made the referral to Dr. Russman in the first place.

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In any event, there is no report from any physician which reveals the medical necessity for the referral to Dr. Russman, and there are no reports from any treating physician which review and incorporate the findings of Dr. Russman. Those facts in conjunction with the lack of MTUS justification were the basis of the finding that the medical treatment services were not reasonably required to cure or relieve the injured worker from the effects of the worker's injury.

(Report, pp. 2-6.)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35

Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Here, it is unclear from our preliminary review whether the legal issues have been properly identified; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary with respect to the issues noted above.

II.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

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].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide

a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant lien claimants' Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov .

For the foregoing reasons,

IT IS ORDERED that lien claimants' Petition for Reconsideration of the Findings of Fact and Orders issued on May 29, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 9, 2024

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

COMPREHENSIVE OUTPATIENT SURGERY CENTER
MARINA RUSSMAN, M.D.
ZA MANAGEMENT
SEDGWICK LIEN RESOLUTION

LAS/abs

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