WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GABRIELA SANTOYO

vs.

GEN KOREAN BBQ HOUSE; ARCH INSURANCE COMPANY, administered by SEDGWICK, INC., *Defendants*

Adjudication Number: ADJ16231186
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on June 21, 2024, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) defendant's May 18, 2023 Utilization Review (UR) denial of the May 10, 2023 Request for Authorization (RFA) was untimely; and (2) the microdiscectomy surgical procedure requested in the May 10, 2023 RFA is not reasonable and necessary.

The WCJ ordered that the request for microdiscectomy surgery be denied.

Applicant contends that the WCJ erroneously failed to find that the microdiscectomy surgical procedure in the May 10, 2023 RFA is reasonable and necessary.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that the record establishes that the microdiscectomy surgical procedure is reasonable and necessary and to order that the request for that surgery is granted.

FACTUAL BACKGROUND

On April 8, 2024, the matter proceeded to trial on the following relevant issues:

[1]. If the 5/18/2023 Utilization Review Decision is untimely, is the requested treatment reasonable and necessary?

[2]. Does the requested microdiscectomy procedure comply with the MTUS Guidelines and/or is it not medically necessary and not reasonably required to cure or relieve from the effects of the injury?
(Minutes of Hearin (Reporter), April 8, 2024, p. 2:11-15.)

Also on April 8, 2024, the WCJ ordered that, "per the recommendation of QME Burge an exam by a spinal surgeon [is] ordered. Exam to be scheduled within 20 days for appointment to occur and thereafter DEF to serve medicals on Exhibit Lists on doctor to be selected" from a list of Christopher Woodson, Walter Burnham, Arash Dini, Dominick Sisto. (Minutes of Hearing and Order for Spinal Surgeon Consult, April 8, 2024.)

On June 3, 2024, the matter continued to further trial, and the WCJ admitted exhibits entitled PTP Report of May 3, 2023, Correspondence from Sedgwick dated May 18, 2023, PTP Report of June 14, 2023, and PTP Report of August 9, 2023 into evidence. (Minutes of Hearing and Summary of Evidence, June 3, 2024, pp. 2:20-4:5.)

The PTP Report of May 3, 2023 states:

INTERVAL HISTORY:
. . .
I was of the opinion that the patient was a candidate for lumbar epidural steroid injection. However, this has been non-certified.

The patient had an MRI scan examination of the lumbar spine which revealed Grade I spondylolisthesis at L5-S 1 with essentially normal disc height. There was diffuse disc bulging which was left paracentral contacting the exiting S1 nerve root.
. . .
DIAGNOSES:
1. Grade I spondylolisthesis, L5-S1.
2. Clinical evidence for S1 radiculopathy.
3. Left paracentral disc protrusion, L5-S1

TREATMENT:
The patient has failed conservative management. She remains very symptomatic. The patient is limited in her activities of daily living.
At this time I am recommending a microdiscectomy procedure at L5-S1 on the left. The patient has motor weakness. She has positive straight leg raise examination. The MRI scan docs reveal left-sided disc protrusion. There is contact of the SI nerve root.
(Ex. 102, PTP Report of May 3, 2023, pp. 1-2.)

The Correspondence from Sedgwick dated May 18, 2023 states:

MTUS-ACOEM states in regard to Lumbar Discectomy for Radiculopathy "Moderately Recommended, Lumbar discectomy is moderately recommended to speed recovery in patients with radiculopathy due to ongoing nerve root compression who continue to have significant pain and functional limitation after 4 to 6 weeks of time and appropriate conservative therapy. For patients who are candidates for discectomy (other than for cauda equina syndrome and the rare progressive major neurologic deficit), there is evidence that there is no need to rush surgical decisions as there is no difference in long-term functional recovery whether the surgery is performed early or delayed. Open discectomy, microdiscectomy, and endoscopic discectomy are all potentially appropriate ways to perform discectomy." as well as "Indications - All of the following should be present: l) radicular pain syndrome with current dermatomal pain and/or numbness, or myotomal muscle weakness all consistent with a herniated disc; 2) imaging findings by MRI, or CT with or without myelography that confirm persisting nerve root compression at the level and on the side predicted by the history and clinical examination; and 3) continued significant pain and functional limitation after 4 to 6 weeks of time and appropriate non-operative therapy that usually includes NSAID(s) . . ." In this case, the patient has the subjective complaints of persistent pain in the lower back radiating into the bilateral lower extremities. There is objective documentation of motor weakness and positive straight leg raise examination on physical examination. However, an undated EMG reportedly revealed negative for acute denervation consistent with motor radiculopathy. Additionally, an MRI dated 2/11/2022 reveals no acute compression deformity is evident. Given the negative EMG and lack of MRI evidence of persisting nerve root compression, the requested service does not meet MTUS-ACOEM guideline criteria and is not medically necessary. As such, the request for Microdiscectomy L5-S1 left PA assistant at United Pacific Surgery Center is not certified.
(Ex. 101, Correspondence from Sedgwick, May 18, 2023, pp. 8-9.)

The PTP Report of June 14, 2023 states:

PHYSICAL EXAMINATION:
On today's examination the patient has weakness in the left ankle and foot. The ankle dorsiflexors, ankle everters, and EHL's are 3-4/5. The plantar flexors arc 5/5 and ankle inverters arc 5/5. The patient has positive straight leg raise examination on the left. Pain extends into the left calf.

. . .

TREATMENT: (Cont.)

. . .

I had recommended a microdiscectomy at L5-S1 on the left. In view of the patient's weakness in the left foot and ankle, as well as positive straight leg raise examination, I am of the opinion that the patient is indeed a surgical candidate and does meet MTUS guidelines.

I am appealing the non-certification for surgical intervention. The patient would benefit from outpatient microdiscectomy procedure at L5-S1 on the left.
(Ex. 2, PTP Report of June 14, 2023, pp. 1-2.)

The PTP Report of August 9, 2023 states:

HISTORY: (Cont.)
. . .
The patient was re-evaluated on February 8, 2023 with persistent low back pain radiating into the bilateral lower extremities. She had weakness in the legs and numbness in the legs. I recommended that the patient undergo lumbar epidural steroid injection at L5-S1.
The patient was referred to Dr. Sadik for pain management consultation, who agreed with the medical necessity for lumbar epidural steroid injection; however, this was non-certified.
The non-certification of the lumbar epidural steroid injection was appealed.
Furthermore, I clearly documented a material change in the patient's examination findings. The patient now had weakness in the left ankle everters. I recommended that the patient undergo a microdiscectomy procedure.
The patient returned for re-evaluation on June 14, 2023. At that time the patient indicated that she underwent lumbar epidural steroid injection in early June 2023. She did not improve.
The patient's physical examination revealed that she had EHL weakness on the left. Plantar flexors and ankle everters were 5/5. She had positive straight leg raise examination on the left.
I was of the opinion that the patient had failed conservative treatment and recommended a microdiscectomy procedure at L5-S1 on the left. Surgery was non-certified. Appeal for non-certification was also non-certified.
. . .
FUTURE/CONTINUING MEDICAL TREATMENT:

Regarding the need for further treatment to cure or relieve the effects of the said injury, it is my opinion that this patient requires access to further care, including occasional visits to an orthopedist, and brief courses of physical therapy of at least six visits twice per year.
In addition, given the patient having motor weakness, positive straight leg raise examination, and Grade I spondylolisthesis, surgical intervention will be required. She will require a discectomy and fusion at L5-S1.
(Ex. 6, PTP Report of August 9, 2023, pp. 2-4.)

In the Report, the WCJ states:

The earliest medical report from Dr. Nussbaum is dated 02/08/2023 (Exhibit 4). In that report Dr. Nussbaum states that on 12/26/2021[sic] Applicant was performing her usual and custom work activities when she slipped and fell forward landing on her knees and noted the immediate onset of back and bilateral knee pain (Id. at p.1). Dr. Nussbaum noted that EMG/NCV testing was performed by Dr. Gazmarian revealing normal electrodiagnostic studies of the lower extremities and that there

was no evidence of left lower extremity radiculopathy (Id) . . . Dr. Nussbaum diagnosed a chronic lumbar sprain/strain as well as a bulging disc at L5-S1 and recommended an epidural steroid injection noting that Applicant had failed physical therapy and chiropractic therapy (Id. at p.4).

The 2022 lumbar MRI report reviewed by Dr. Nussbaum was issued by Dr. Stephanie Chiu on 02/11/2022 which noted at L5-S1 that "There could be less than 1 mm posterior disc bulge of the disk annulus" with mild left facet degeneration and no central canal or foraminal stenosis. (Exhibit A, p.1). Additionally, this report also noted there was "no disk herniation" at this level. (Id. at p.2).

In his 03/22/2023 report Dr. Nussbaum noted Applicant complains of back pain with radiation into the left lower extremity noting she had undergone pain management, and that the steroid injection was non-certified (Exhibit 3, p.1). Dr. Nussbaum further noted Applicant had positive straight leg raising on the left and evidence of disc bulging (Id.) and recommended a lumbar epidural steroid injection. (Id at p.2).
. . .
Pursuant to an Order by the court, an updated lumbar MRI report dated 12/21/2023 was issued by Dr. Charlie Crum (Exhibit 14). This report noted that at L5-S1 there was mild degenerative disc disease, a mild diffuse bulging disc with moderate bilateral facet arthropathy, no significant central canal narrowing and mild bilateral neural foraminal stenosis (Id. at p.1). Although somewhat difficult to read, this report also notes lumbar spondylosis most prominent at L4-L5 "with lateral recess stenosis and crowding of both L5 nerve roots as well as bilateral neural foraminal stenosis and crowding on both the L4 nerve roots." (Id. at p.2).

This updated MRI report was reviewed by orthopedic QME, John R. Burge, D.O. and discussed in the doctor's supplemental report dated 12/22/2023 (Exhibit 107). The QME noted that the updated 2023 lumbar MRI scan found lumbar spondylosis most prominent at L4-L5 and lateral recess stenosis and crowding "of both L5 nerve roots as well as bilateral neural foraminal stenosis and crowding of the L4 nerve roots" (Id. at p.2). These changes suggest an increased risk of nerve compression possibly leading to pain, numbness or weakness at the L4-L5 level, which led Dr. Burge to recommend "surgical intervention" as a reasonable next step as well as a referral for "a second opinion consultation with another spine surgeon" noting that if that surgeon found indication "for decompression surgery" than Applicant should have it. (Id. at p.3).

A second-opinion surgery evaluation was conducted by Dr. Walter Burnham on 04/25/2024 (Exhibit 108). Dr. Burnham notes Applicant complains of low back pain that radiates into the bilateral lower extremities and notes that Applicant "is not restricted in her daily activities." (Id. at p.2). Dr. Burnham reviews the 12/21/2023 MRI report noting spondylosis most prominently at L4-L5 with stenosis and crowding of nerve roots at that level (Id. at p.4). Under the "Treatment Plan" heading, Dr. Burnham notes that Applicant "does not want to generally

consider surgical intervention." (Id. at p.5). Dr. Burnham then states that if conservative measures such as PT, Chiro and injections fail then he recommends "Total Disc Replacement versus Anterior Interbody Fusion." (Id.). The doctor finishes up by stating as follows: "Finally, while not opposed to the consideration of surgical intervention, in my opinion there is indication for at this time are limited and due to her complaints of pain more so than objective findings on XR or physical exam." (Id.)

. . .

Applicant testified at the Trial of 06/03/2024 that she had pain in her back that goes down both legs along with numbness in both legs (MOH/SOE 06/03/2024 p.5). She had more pain in the left leg and described a pins-and-needles sensation along with weakness in her right leg (Id.). Applicant additionally testified that she had undergone physical therapy, chiropractic care, acupuncture, pain patches, NSAIDS, Celebrex and a lumbar epidural steroid injunction to treat her back complaints, but none of these modalities resolved her complaints (Id.). Applicant also testified that her back pain limited her daily activities of walking, sitting, driving, using stairs, bending, squatting and caused her sleep problems (Id.). Applicant testified as well that Dr. Nussbaum recommended back surgery to her and that she wants to undergo back surgery (Id.).

(Report, pp. 2-8.)

DISCUSSION

I.

Former Labor Code 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, Labor Code 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 Labor Code 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 Management 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 July 29, 2024, and 60 days from the date of transmission is September 27, 2024. This decision is issued by or on September 27, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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 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. Labor Code 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 July 29, 2024 and the case was transmitted to the Appeals Board on July 29, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 29, 2024.

II.

Applicant contends that the WCJ erroneously failed to find that the microdiscectomy surgical procedure in the May 10, 2023 RFA is reasonable and necessary. Specifically, applicant contends that Dr. Nussbaum's reporting of applicant's symptomatology against the applicable criteria demonstrates that microdiscectomy surgery is reasonably required to cure or relieve her from the effects of injury.

We observe that Labor Code section 4600[1] provides that an employer must provide "[m]edical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury." (§ 4600 (a).)

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

In *Sandhagen v. Workers' Comp. Appeals Bd*. (2008) 44 Cal.4th 230 [73 Cal. Comp.Cases 981], the Supreme Court stated:

> The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. Accordingly, notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5).
> (*Sandhagen*, *supra*, at p. 990.)

Thus, it is applicant's burden to prove that she is entitled to the treatment sought by way of Dr. Nussbaum's RFA, and applicant may meet this burden by presenting substantial medical evidence that the treatment is appropriate under the MTUS or, though at variance with the MTUS, reasonably required to cure or relieve her of injury. (*Dubon v. World Restoration* (2014) 79 Cal.Comp.Cases 1298, 1312 (Appeals Board en banc); § 4604.5(a) (providing that the MTUS shall be presumptively correct on the issue of extent and scope of medical treatment, but may be controverted by a preponderance of the scientific medical evidence establishing that variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of injury).)

Hence, notwithstanding that the parties framed the issue for trial as whether "the requested microdiscectomy procedure compl[ies] with the MTUS Guidelines and/or is it not medically necessary and not reasonably required," applicant may carry her burden of proof of entitlement to the procedure either by demonstrating that the treatment is either appropriate under the MTUS or the treatment, though at variance with the guidelines, is reasonably required to cure or relieve her from the effects of injury. (Minutes of Hearing (Reporter), April 8, 2024, p. 2:11-15; § 4604.5(a).)

In this case, the record shows that applicant's physician, Dr. Nussbaum, initially recommended that she receive lumbar epidural steroid injection and the request was non-certified. (Ex. 102, PTP Report of May 3, 2023, p. 1.) Applicant underwent an MRI of the lumbar spine, which revealed Grade I spondylolisthesis at L5-S1 and "diffuse disc bulging which was left paracentral contacting the exiting S1 nerve root. (*Id*., pp. 1-2.) These findings, the physician reasoned, provided "[c]linical evidence for S1 radiculopathy" and warranted microdiscectomy at

the L5-S1 in light of the "fail[ure] of conservative management" and applicant's "limited activities of daily living." (*Id*.)

On June 14, 2023, Dr. Nussbaum again recommended "microdiscectomy at L5-S1 on the left," opining that applicant "does meet MTUS guidelines." (Ex. 2, PTP Report of June 14, 2023, pp. 1-2.)

Under the MTUS guidelines, applicant "should" present with (l) radicular pain syndrome with current dermatomal pain or numbness or myotomal muscle weakness; (2) imaging findings by MRI or CT, with or without myelography, that confirm persisting nerve root compression at the level and on the side predicted by the history and clinical examination; and (3) continued significant pain and functional limitation after 4 to 6 weeks of time and appropriate non-operative therapy. (Ex. 101, Correspondence from Sedgwick, May 18, 2023, pp. 8-9.)

Here, the medical record clearly establishes that applicant has radicular pain syndrome with dermatomal pain and myotomal muscle weakness and experienced significant pain and functional limitation over a period extending beyond six weeks. (Ex. 102, PTP Report of May 3, 2023, pp. 1-2; Ex. 2, PTP Report of June 14, 2023, pp. 1-2; Ex. 6, PTP Report of August 9, 2023, pp. 2-4.)

Significantly, the record also shows that Dr. Nussbaum reviewed the MRI and found that its findings of "diffuse disc bulging which was left paracentral contacting the exiting S1 nerve root" were consistent with applicant's clinical symptoms giving rise to predicted pain on the left side. Although the MRI's findings do not state that applicant's disc bulging contacting the exiting S1 nerve root compresses the nerve root, it objectively describes the source or mechanism of applicant's symptomatology in line with the MTUS. (Ex. 101, Correspondence from Sedgwick, May 18, 2023, pp. 8-9; Ex. 102, PTP Report of May 3, 2023, pp. 1-2; Ex. 2, PTP Report of June 14, 2023, pp. 1-2.) Thus, the treatment is appropriate under the MTUS guidelines, guidelines which allow the physician to exercise clinical discretion in their application. (Ex. 101, Correspondence from Sedgwick, May 18, 2023, pp. 8-9.)

Since Dr. Nussbaum's reporting was predicated on reasonable medical probability and set forth his reasoning and did not state mere conclusions, the record establishes that applicant meets the criteria of the MTUS for the microdiscectomy surgical procedure. (*McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 413, 416–417, 419 [33 Cal.Comp.Cases 660] (stating that it has been long established that, in order to constitute substantial evidence, a medical opinion

must be predicated on reasonable medical probability; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc) (stating that a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions); *Granado v. Workers' Comp. Appeals Bd*. (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding).

While noting that recent medical evaluations such as that conducted by Dr. Burnham pursuant to the Order for Surgical Consult recommend various surgical interventions such as total disc replacement based upon varying diagnostic impressions, we are not persuaded that they contravene Dr. Nussbaum's reporting because they do not opine that microdiscectomy surgery is unwarranted or that the progression of her symptomatology renders it unnecessary. (Minutes of Hearing and Order for Spinal Surgeon Consult, April 8, 2024; Report, pp. 7-8.) And, to the extent that Dr. Burnham's reporting may have rendered the issue of when and which type of surgical intervention may cure or relieve applicant of her injury unclear, the WCJ should have ordered further development of the record. (See *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [65 Cal.Rptr.2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal.Rptr.2d 898, 63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also § 5313.)

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that the record establishes that the microdiscectomy surgical procedure is reasonable and necessary and to order that the request for that surgery is granted.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact and Order issued on June 21, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings of Fact and Order issued on June 21, 2024 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

***

3. The microdiscectomy surgical procedure requested by the May 10, 2023 RFA is reasonable and necessary.

ORDER

1. The request for microdiscectomy lumbar surgery is hereby **GRANTED.**

***

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT, (See attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 27, 2024

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

GABRIELA SANTOYO
BERKOWITZ AND COHEN
SAPRA & NAVARRA

SRO/*cs*

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

DISSENTING OPINION OF COMMISSIONER JOSE RAZO

I respectfully dissent.

For the reasons stated in the WCJ's Report, which I would adopt and incorporate, I would affirm the finding that the microdiscectomy surgical procedure requested in the May 10, 2023 RFA is not reasonable and necessary. As stated by the WCJ:

> First, let us address the application of the MTUS-ACOEM guidelines for spinal surgeries which state that the following 3 test prongs should all be present to find that the recommended surgery is evidence based:
>
> (1) Radicular pain syndrome with current dermatomal pain and/or numbness, or myotomal muscle weakness all consistent with a herniated disc;
>
> (2) Imaging findings by MRI, or CT with or without myelography that confirm persisting nerve root compression at the level and on the side predicted by the history and clinical examination; and
>
> (3) Continued significant pain and functional limitation after 4 to 6 weeks of time and appropriate non-operative therapy that usually includes NSAID(s).
>
> Here petitioner Applicant contends that Prong 1 is satisfied because Applicant complained of radicular pain, the EMG/NCV report by Dr. Gazmarian noted a HNP at L5-S1 as visualized on MRI but which was not mentioned in the MRI report (Exhibit 104, p.3), and that Applicant's complaints of bilateral leg numbness and muscle weakness in the left ankle everter represents dermatomal pain. Applicant's analysis here is flawed and incomplete.
>
> First, this court concedes that Applicant has consistently complained of bilateral lower extremity radicular complaints and that the court found Applicant credible regarding same. However, if subjective complaints were all that were needed to resolve surgery disputes, then physicians and surgeon opinions would be superfluous. Thus, the MTUS standards place reliance on objective medical evidence. Here, as to Applicant's radicular complaints, there is no objective evidence of same. The EMG/NCV study referred to by Applicant is completely normal.
>
> Nevertheless, conceding existence of radicular complaints for the sake of argument, Applicant also contends that this first prong does not require an actual herniated disc. This court disagrees. But even conceding on this point as well Applicant still cannot satisfy Prong #1 as Applicant no longer has left ankle everter muscle weakness as of the 04/03/2024 exam with Dr. Nussbaum (Exhibit G). This fact combined with the fact that objective testing for radicular lower extremity complaints by way of EMG/NCV had completely normal findings leads necessarily to the conclusion that Applicant did not meet the requirements of Prong #1.

Applicant also does not satisfy Prong #2. For starters, she basically concedes this fact at p. 3, lines 18-20 of her Petition for Reconsideration. However, despite this concession, Applicant goes on to make a distinction between the term "diagnostic reading" and the term "imaging findings" noted on the second prong of the MTUS standards. While the difference between these two terms is not readily apparent to this court, Applicant apparently intends for "diagnostic reading" to refer to a radiologist's report prepared from reviewing the actual MRI films, whereas "Imaging findings" apparently refers to the act of a physician looking at or reviewing the actual MRI films. In essence, Applicant contends the best evidence is the primary source, or the MRI imaging findings, or films, themselves. Although this distinction is an important one, it is not helpful to Applicant.

With one exception, this court could not glean from the reports of Drs. Nussbaum or Burge or Burnham whether these doctors ever reviewed the actual lumbar MRI films from the diagnostic testing dates in February 2022 and December 2023. There were only two reports where it appeared that the reporting physician reviewed the actual MRI films - the 07/28/2022 lower extremity EMG/NCV testing report by Dr. Gazmarian where the doctor notes: "symptomatic left lumbar radiculopathy due to L5-S1 HNP as visualized on MRI (not mentioned on report) from 2/11/22." (Exhibit 104, p.3.) and the latest report from Dr. Nussbaum dated 04/03/2024 (Exhibit G). Of these two reports, Dr. Gazmarian's leaves more questions than answers and Dr. Nussbaum's last report, in this court's opinion, makes clear that Applicant is no longer a candidate for lumbar microdiscectomy at L5-S1.

Although Dr. Gazmarian appears to indicate that he saw a herniated disc on the February 2022 MRI film, this opinion provides no help to Applicant for multiple reasons. First, Dr. Gazmarian does not explain what "HNP" means. If he intended it to mean herniated nucleus pulposus, such a finding was not noted by any other evaluating or treating physician in this case. Second, the notation from Dr. Gazmarian fails to state any other details, such as size or left or right-sided orientation. Third, the report from Dr. Gazmarian is an EMG/NCV report and not an MRI report. Fourth, the doctor fails to reconcile the seemingly conflicting findings of a herniated disc and the completely normal electrodiagnostic studies which found absolutely no evidence of lumbar radiculopathy. In terms of treatment, Dr. Gazmarian only recommends an epidural injection. His report does not mention surgery at all.

Alternative to the cryptic and incomplete findings of Dr. Gazmarian we have the final word on the microdiscectomy issue from the physician that started it all back in May 2023. Dr. Nussbaum clearly states in his 04/03/2024 report that he reviewed the MRI "films" but nowhere in this report does the doctor mention a herniated disc, which certainly seems to undermine the efficacy of Dr. Gazmarian's findings. In this case, the MRI "films" were reviewed by the treating, Dr. Nussbaum. After reviewing the MRI "films" and conducting a completely negative physical examination, Dr. Nussbaum failed to recommend, or even mention, any surgery. Thus, to the extent any examining or treating doctors in this case did or did not view

the actual MRI films, Dr. Nussbaum, the doctor who recommended microdiscectomy in the first place, no longer recommends it after viewing the updated MRI scan and conducting an updated clinical examination. Therefore, Applicant's distinction regarding review of actual MRI films does not support her argument.

Getting back to the MTUS guidelines, it is apparent that Prong #2 requires "compression" upon the nerve root and the two lumbar MRI scans in this case, at most, mention only contact on the nerve root at L5-S1. Although there is a questionable finding of a herniated disc by Dr. Gazmarian, he does not make any mention of either contact or compression of the nerve root. Therefore, Applicant's spinal condition does not meet the requirements of the second prong.

With regard to the requirements of Prong #3 this court has reconsidered its previous opinion and now concedes that Applicant does satisfy this prong as it is the most subjective of the three. However, since the MTUS standards here require all three prongs to be met, Applicant cannot satisfy the requirements of the MTUS.

As demonstrated above, the Applicant is unable to satisfy all 3 prongs of the MTUS guidelines. These guidelines require a certain minimal existence of objective findings to justify the serious consideration of performing a spine surgery and we do not have that here.
(Report, pp. 9-14.)

I would conclude that the treatment request is not appropriate under the MTUS guidelines and that the medical record fails to rebut its application.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
SEPTEMBER 27, 2024
SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GABRIELA SANTOYO
BERKOWITZ AND COHEN
SAPRA & NAVARRA

SRO/*cs*

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