WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GILBERTO RODRIGUEZ PADILLA, ***Applicant***

vs.

RANCHO CALIFORNIA LANDSCAPING, INC., dba PRO GROWERS, INC.; PREFERRED PROFESSIONAL INSURANCE COMPANY, administered by OMAHA NATIONAL UNDERWRITERS, ***Defendants***

Adjudication Number: ADJ14743881, ADJ14743881
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order issued by the workers' compensation administrative law judge (WCJ) in this matter on June 27, 2024. In that decision, the WCJ found in pertinent part that applicant, while employed on June 3, 2021 as a gardener by defendant, sustained industrial injury arising out of and in the course of his employment to the head, neck, and concussion. The WCJ further found that the Utilization Review (UR) of the January 25, 2023 treatment request for authorization (RFA) was untimely, however the treatment requested in the RFA was not reasonable or necessary. Further, that the issue was moot as a new determination could now be obtained under Labor Code section 4610(k)[1], and that *Patterson*[2] does not apply to this case at this time.

Petitioner contends that the WCJ erred in finding that the passage of time since the RFA issued makes the RFA and the need for the recommended treatment moot, and further, that substantial evidence supports the services requested by Dr. Patterson in the January 25, 2023 RFA for a Transitional Living Center (TLC) residential program for applicant.

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

[2] The WCJ is referring to the significant panel decision in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 [2014 Cal. Wrk. Comp. LEXIS 98] (Significant Panel Dec.) (*Patterson*). A significant panel decision is a decision of the Appeals Board that has been designated by all members of the Appeals Board as of significant interest and importance to the workers' compensation community. Although not binding precedent, significant panel decisions are intended to augment the body of binding appellate and en banc decisions by providing further guidance to the workers' compensation community. (Cal. Code Regs., tit. 8, § 10305(u).)

We have received an Answer from defendant.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's 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

As set forth in the Minutes of Hearing and Summary of Evidence (MOH/SOE) dated July 26, 2023, the parties stipulated that the applicant, while employed on June 3, 2021 as a gardener, at Bell Gardens, California, by Rancho California Landscaping, Incorporated, doing business as Pro Growers, sustained injury arising out of and in the course of employment (AOE/COE) to the head, neck and concussion. [3] The matter was set for expedited hearing, and the issues were listed as follows:

1. Whether or not the UR decision regarding transitional living was timely.
2. If the UR decision was untimely, is the treatment reasonable and necessary?

The Joint exhibits proposed by the parties as well as applicant and defendant's exhibits were entered into evidence, with the exception of defendant's exhibit E, the UR denial dated February 8, 2023.

On September 28, 2023, the WCJ issued a Findings and Order in which she found, in pertinent part, the UR denial of January 25, 2023[4] and the UR denial of February 8, 2023 were

[3] We note that "concussion" is neither a body part nor system, but a diagnosis. The better practice is to list the affected part or parts of body or body system.

[4] While the WCJ in her Findings lists the UR denial as dated January 25, 2023, this date appears an inadvertent error, as that date was the date of the RFA on the second UR decision in issue. The first RFA was dated June 8, 2022, with a UR denial of June 22, 2023, as per Exhibit D and the Opinion on Decision.

both untimely, and that the medical services requested in the June 8, 2022 RFA were reasonable and necessary.

On November 23, 2023, both defendant and applicant filed petitions for reconsideration. Defendant alleged that the January 25, 2023 UR denial was timely, and that the independent medical review (IMR) did not find the treatment to be reasonable nor necessary. Applicant asserted that the WCJ failed to determine whether the medical services set forth in the RFA dated January 25, 2023 were reasonable and necessary.

On November 2, 2023, the WCJ issued an Order Vacating the Findings and Order and Setting the Matter for MSC (Order).

The parties returned to the trial calendar on April 11, 2024, at which time the issue to be decided was listed as "resubmission of trial originally submitted on July 26, 2023, regarding a Request for Authorization dated 1-25-23." (MOH, 7/26/23, p.2.)

The WCJ admitted into evidence all of the exhibits introduced at the prior trial (Exhibits 1 through 9, A through E, and R through U) and marked several additional exhibits for identification. Applicant testified and the matter was thereafter submitted for decision.

On June 27, 2024, the WCJ issued her Findings and Order in which she found that the UR review of the January 25, 2023 RFA was untimely, but the inpatient transitional living treatment requested in that January 25, 2023 RFA was not reasonable or necessary, and *Patterson* did not apply to this case. She further made a finding that as the UR denial issued on February 8, 2023 (Exhibit E), was not filed, it was not admitted into evidence, despite a contradictory statement in the Opinion. (Findings and Order #3, Opinion, p. 3.)

The WCJ additionally found that the issue was moot as a new UR determination can now be obtained under Labor Code section 4610(k).

It is from these Findings and Order that applicant seeks reconsideration.

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.

Preliminarily, we note the following in our review:

> The WCJ addresses the contentions of petitioner in her Report as follows:
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> ***
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> Applicant's counsel requests reconsideration on the following grounds:
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> 1. The need for treatment is not moot based on the passage of time; and
>
> 2. The treatment requested is supported by substantial evidence.
>
> As to the first ground, I agree, the need for treatment is not moot solely based on the passage of time, but UR determinations do. Here, the UR determination at issue is over a year old. As provided under Labor Code § 4610 (k), the UR decision denying the recommended treatment is no longer in effect and a new one can be obtained. Applicant is still very much entitled to medical treatment subject to UR approval.
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> As to the second ground, that the treatment requested is supported by substantial evidence, that is not the correct standard.
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> LC 4604.5(d) provides that for all injuries or conditions not covered by the MTUS, authorized treatment must be in accordance with other evidence-based medical treatment guidelines generally recognized by the national medical community and scientifically based. Treatment may not be denied solely on the basis that a condition or injury is not addressed by the MTUS (CCR 9792.21(d)). Also, treatment may not be denied on the sole basis that it is not addressed by the MTUS (CCR 9792.8(a)(2)). See Taylor v. State of California, Department of Rehabilitation, 2005 Cal. Wrk. Comp. P.D. LEXIS 49; Glaxo Smith Kline v. WCAB (Batterman) (2006) 71 CCC 283 (writ denied).
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> Here, the PTP diagnoses the applicant with mild traumatic brain injury (Exhibit 3, page 3). The IMR (Exhibit C, page 3) states that the MTUS recommends home and community based rehabilitation for traumatic brain injury. The treatment being sought in this RFA is for a transition living residential program (see Exhibit U).
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> (Report, p. 3-4.)

While the WCJ made a finding that the UR of the RFA of January 25, 2023 was untimely, it appears that the WCJ relied, at least in part, upon the IMR determination letter of March 27, 2023 which reviewed that same UR denial upon which to find that the requested services were not reasonable or necessary.

III.

In *Dubon v. World Restoration, Inc*. (2014) 79 Cal.Comp.Cases 1298, 1299 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that if a UR decision is untimely, the UR decision is invalid and not subject to independent medical review (IMR). If a UR decision is untimely, the determination of medical necessity for the treatment requested may be made by the Appeals Board based on substantial evidence. (*Id*. at pp. 1300; 1312.)

Thus, where a defendant's UR decision is untimely, the injured employee is nevertheless entitled only to "reasonably required" medical treatment (§ 4600(a)) and it is the employee's burden to establish his or her entitlement to any particular treatment (§§ 3202.5, 5705), including showing either that the treatment falls within the presumptively correct MTUS or that this presumption has been rebutted. (§ 4604.5; see also § 5307.27.) Moreover, to carry this burden, the employee must present substantial medical evidence. **[**35]** (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal. 3d 159, 164 [193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal.Comp. Cases 566]; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169-170 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal. Comp. Cases 93].) (*Ibid.*)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]*; Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]*; Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely their 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]; *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at pp. 799, 800-801 [an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence]; see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] [the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the

conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).

At this time, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

IV.

In addition, 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. IndustrialAcci*. *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 [32 Cal.Comp.Cases 431]; *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.

V.

Accordingly, we grant applicant's 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 applicant's Petition for Reconsideration of the Findings and Order issued on June 27, 2024 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 25, 2024

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

GILBERTO RODRIGUEZ PADILLA
SOLOV & TEITELL
ALBERT AND MACKENZIE

LAS/abs

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