

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JAMES MERRY, *Applicant*

vs.

ALAMEDA HEALTH SYSTEMS, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ18090375
Oakland District Office**

**OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of June 21, 2024, wherein it was found that a Request for Authorization (RFA) for medical treatment properly requested expedited utilization review (UR), that UR was not completed in a timely manner, that the WCAB thus had jurisdiction over the dispute for medical treatment, and that applicant did reasonably require medical treatment in the form of a supportive living program at the Centre for Neuro Skills (CNS). In this matter, while employed on October 7, 2022 as a nurse anesthetist, applicant sustained industrial injury to his head.

Defendant contends that it timely completed UR, arguing that applicant's physician did not adequately document the need for expedited review, and thus the UR decision was due under normal timelines. Defendant thus argues that the WCAB did not have jurisdiction over the medical treatment dispute.

We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). For the reasons stated by the WCJ in the portions of the Report and Opinion on Decision quoted below, we will deny the defendant's Petition.

We will deny defendant's Petition for the reasons stated in the Report and Opinion on Decision quoted below, as well as the additional reasons stated below.

Preliminarily, we note that 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 August 12, 2024, and 60 days from the date of transmission is October 11, 2024. This decision is issued by or on October 11, 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 August 12, 2024, and the case was transmitted to the Appeals Board on August 12, 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 August 12, 2024.

Turning to the merits, the Opinion and Decision and the Report explain why the March 22, 2024 report of primary treating physician Henry Koh, M.D. meets the criteria for expedited review pursuant to Labor Code section 4610(i)(3) and Administrative Rule 9792.9.1(c)(4) (Cal. Code Regs., tit. 8, § 9792.9.1, subd. (c)(4).) The Petition appears to argue that the criteria was not met because Dr. Koh did not use the specific language of the statute and/or regulation in explaining why expedited review was necessary. However, the statute and regulation only require that the request or accompanying report document the need for expedited review, not that any specific language be utilized or that the substantiation occur in any specific place of the request or accompanying medical report. Accordingly, we will deny defendant's Petition for the reasons stated in the Opinion on Decision and Report quoted below. We have omitted the discussion in the Report of applicant's case manager's letter of May 6, 2024 as evidence that applicant's request for expedited review was properly supported. Since this letter was drafted after the submission of the RFA, and was not submitted to the defendant as part of the UR process, it cannot be a basis for stating that the request for expedited review was proper. However, Dr. Koh's report itself contains the basis for the necessity of expedited review.

OPINION ON DECISION

Applicant James Merry was employed as a nurse anesthetist by defendant Alameda Health Systems. On 10-07-2022, Applicant sustained a serious injury when a large cardiac monitor fell from a height of approximately 8 to 10 feet, striking the top of the Applicant's head. As a result of this incident, Applicant has been diagnosed with a traumatic brain injury with cognitive impairments.

On 04-10-2024, Applicant's treating physician Dr. Henry Koh of Centre for Neuro Skills (CNS) submitted a Request for Authorization (RFA) requesting a supported living program for 60 days from April 22 to June 20, 2024. (Ex. 1.) At the top of the RFA, "New Request" was checked, as well as "Expedited Review: Check box of employee faces an imminent and serious threat to his or her health." Attached to the RFA was Dr. Koh's PR-4 Report dated 03-22-2024. (Ex. 2.)

There is no dispute that the RFA of 04-10-2024 was received by the claims administrator on the same day and it was submitted for a Utilization Review (UR) determination. (Ex. 3.) On 04-17-2024, the UR vendor Claims Eval issued

a non-certification letter to deny a 60-day supported living program at CNS. (Ex. 4.)

On 05-06-2024, the Applicant's Clinical Case Manager at the Centre for Neuro Skills, Courtney Asbill, M.A., submitted a letter as part of an internal appeal to Utilization Review to appeal the UR denial. (Ex. 5.) For UR, the time limits set forth in Labor code section 4610 are mandatory. The Appeals Board does not have jurisdiction to address whether treatment requested in a timely UR decision is reasonably required. Appeal of a timely UR delay, denial, or modifying a treatment request is the purview of Independent Medical Review (IMR). The "IMR process is the exclusive mechanism for review of a utilization review decision." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1048 [236 Cal. Rptr. 3d 853, 423 P.3d 975, 83 Cal.Comp.Cases 1523]; *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc).) However, Board has jurisdiction to determine whether a UR decision is timely. Pursuant to *Dubon*, if UR is untimely or otherwise "suffers from material procedural defects," the issue of medical necessity is not subject to IMR but is to be determined by the Appeals Board based upon substantial medical evidence with the employee having the burden of proving the treatment is reasonably required.

Applicant contends that pursuant to Labor Code section 4610(i)(3) and 8 C.C.R. § 9792.9.1(c)(4), the RFA of 04-10-2024 was submitted for "Expedited Review" as there was an imminent and serious threat to the injured worker's health and the failure of the UR vendor to respond to the RFA within 72-hours renders it untimely. It is uncontested that the RFA and the supporting report of Dr. Koh were submitted and received by defendant on 04-10-2024. (Ex. 3 and Ex. 4.) On the face, the UR decision of 04-17-2024 affirms receipt on 04-10-2024 and therefore the decision did not meet the 72-hour timeframe for expedited review. (Ex. 4.)

Defendant contends, however, that the RFA of 04-10-2024 did not meet the criteria set forth in Labor Code section 4610(i)(3) because the RFA and physician's report did not show:

1. the employee faces an imminent and serious threat to his or her health, including, but not limited to, the potential loss of life, limb or other major bodily function; or
2. the normal time limit for the decision-making process would be detrimental to the employee's life or health or could jeopardize the employee's ability to regain maximum function.

Specifically, Defendant contends that the RFA and PR-4 does not satisfy either criteria for expedited review and, furthermore, the report deems Applicant permanent and stationary. Defendant contends that the PR-4 is equivocal in that

saying Applicant “would benefit from ongoing care at CNS.” As Applicant points out, Applicant suffered a serious traumatic brain injury resulting in cognitive impairment including but not limited to deficits in attention, memory, processing speed, executive functioning, and speech dysfluencies. The PR-4 outlines the intensive course of treatment at CNS since the date of injury. His balance is impaired and he “has persistent imminent risk of falls and subsequent injury.” (Ex. 2 at 6.) Dr. Koh reiterates this in the functional capacity assessment where applicant can only perform limited push and/or pull activities as he is “unable to safely perform secondary to fall risks.” (Id., at 6.)

Applicant has continued light sensitivity, blurred vision/reading even with prescription lenses, suffers from visual stain, persistent headaches, dizziness and tinnitus. (Id., at 3.) Applicant has continued urge incontinence and is still using “depends type pads”. (Id., at 3.) He suffers from nausea. (Id.) He has tremors in his hands and cubital tunnel syndrome. (Id., at 3 and 4) He has persistent memory deficits “so he uses alarms and notebooks and calendars.” (Id., at 3.) Applicant has limited family support in the local area. (Id., at 2.) He is suffering from a non-industrial cancer diagnosis in the neck, and though this non-industrial, psychiatric injury is alleged and the PR-4 notes that neurocognitive treatment was provided by Dr. Parke. There may be apportionment to the psychiatric impairment, but impairment is likely as Dr. Parke reported a history of Applicant leaving the water running, forgetting to start his dishwasher, and using tools like notes to track forgetfulness about tasks. (Id., at 1.)

Dr. Koh’s diagnosis and impairments include cognitive impairment in terms of attention, memory, processing speed, executive functioning and dysfluencies, reduced daytime alertness. (Id., at 5.) Applicant has moderate to severe uncontrolled headaches that interfere with activities of daily living. (Id.) The treating physician opines that Applicant “requires direction of some activities of daily living.” (Id.) Applicant’s equilibrium is problematic, he is limited in his ADLs, and “has a persistent imminent risk of additional falls and subsequent injury.” (Id. at 6.) Page 1 of the RFA also lists all these conditions, but more succinctly. (Ex. 1.)

This is a traumatic brain injury case. The RFA details a constellation of conditions showing that Applicant cannot independently perform all activities of daily living and is at risk of falling or hurting himself in any number of ways. Applicant’s inability to fully function in both physical and mental tasks pose an imminent and serious threat to his health. Applicant has met his burden of proving that the RFA requesting “Expedited Review” should have been processed within 72-hours as there was and is an imminent and serious threat to Applicant’s health.

Under *Dubon*, the Appeals Board has jurisdiction over an untimely UR decision. The UR denial is based on the California MTUS-ACOEM guidelines that supported living programs are selectively recommended for treatment of

traumatic brain injury patients and may be discontinued if there is recovery sufficient to not require the program. (Ex. 4 at 2.) The decision states that Applicant's conditions can be addressed by lower level of care, HEP, or coping strategies learned from rehabilitation. (Id.) The decision seems to infer that the Applicant is stable now that he is permanent and stationary.

The denial is deficient as it fails to define an appropriate lower level of care. The denial also ignores the fact that Applicant has limited family support in the area. In addition, applicant is at maximum medical improvement by legal definition only: regulation 10116.9(m) defines "permanent and stationary" as the point in time when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment. (8 C.C.R. 10116.9(m).) According to Dr. Koh, improvement is not applicable in this case, rather, Applicant is permanent and stationary now after many months of traumatic brain injury rehabilitation because he will unfortunately *not* improve. Dr. Koh states that applicant's case is "catastrophic" and is 100% permanently disabled and unable to compete in the open labor market because he is not independent and *not* self-reliant. (Id., at 5.) The subsequent appeal by CNS dated 05-06-2024 reiterates the need for continued rehabilitation support *to maintain* the level of function achieved over the course of long treatment. (Ex. 5 at 1-2.) That is, failure to maintain the supported treatment in form of further denials could result in a decline in Applicant's health and status including but not limited to repeat hospitalizations, re-injury, and/or death. Clearly, the request for treatment by CNS is also reasonable and necessary medical treatment.

The WCJ's Report is as follows:

I. INTRODUCTION

Date of Injury:	09-14-2022
Body Parts:	head injury involving multiple body parts/systems
Occupation:	nurse
Petitioner:	Defendant Alameda Health Systems
Timeliness:	The petition, filed on 07-16-2024, is timely
Verification:	The petition is verified

Petitioner's Contention: Defendant contends that the Request for Authorization of Treatment requesting Expedited Review (RFA) dated 04-10-2024 did not meet the requirements of Labor Code section 4610(i)(3), that the treatment requested is not reasonable or necessary, and further contests the award of future medical care.

II. PROCEDURAL HISTORY

An Expedited Hearing took place on 06-20-2024 at which time the issue was

submitted on the record. (Minutes of Hearing dated 06-20-2024.) Findings and Award issued on 06-21-2024. On the twenty fifth calendar day following service of the Findings and Award, defendant Alameda Health Systems by its attorney Finnegan Marks San Bruno e-filed a Petition for Reconsideration under the designation “Petition-Other.” Since defense counsel did not use the proper designation in EAMS, no task for Petition for Reconsideration was created. At request of the undersigned, Applicant’s attorney filed an Answer to the Petition for Reconsideration on 07-16-2024. Then, Applicant’s Attorney filed an Amended Answer to Petition for Reconsideration dated 07-26-2024.

III. FACTS

The facts are undisputed. Applicant James Merry was employed as a Nurse Anesthetist by defendant Alameda Health Systems when on 10-07-2022, he sustained a serious injury after a medical monitor fell on him, striking the top of his head. As a result of this incident, Applicant claims injury to the head, brain, eye and psyche.

Dr. Henry Koh of Centre for Neuro Skills (CNS) is applicant’s treating physician. Dr. Koh issued a PR-4 report dated 03-22-2024 wherein applicant was deemed permanent and stationary. Applicant has been diagnosed with a traumatic brain injury and resulting cognitive impairments including but not limited to deficits in attention, memory, processing speed, executive functioning, and speech dysfluencies. The PR-4 states that applicant’s balance is impaired and he “has persistent imminent risk of falls and subsequent injury.” (Ex. 2 at 6.) Dr. Koh’s functional capacity assessment states applicant can only perform limited push and/or pull activities as he is “unable to safely perform secondary to fall risks.” (Id., at 6.) In fact, applicant suffered a fall in March of 2023. (Id., at 2.) He also hurt his left wrist in a fall in October of 2023. (Id., at 5.)

In addition, the PR-4 states that applicant has light sensitivity, blurred vision/reading even with prescription lenses, suffers from visual stain, persistent headaches, dizziness and tinnitus. (Id., at 3.) Applicant has continued urge incontinence and is still using “depends type pads.” (Id., at 3.) Applicant suffers from nausea. (Id.) He has tremors in his hands and cubital tunnel syndrome. (Id., at 3 and 4) He has persistent memory deficits “so he uses alarms and notebooks and calendars.” (Id., at 3.)

Applicant is suffering from a non-industrial cancer diagnosis in the neck, and though this non-industrial. (Id.) Neurocognitive treatment was provided by Dr. Parke. Dr. Parke reported a history of Applicant leaving the water running, forgetting to start his dishwasher, and using tools like notes to track forgetfulness about tasks. (Id., at 1.) Applicant has limited family support in the local area. (Id., at 2.) Dr. Koh opines that applicant is rated at 100% disabled because of the industrial injury and is not able to compete in the open labor market. (Id. at 5.)

Subsequently, on 04-10-2024, Dr. Koh issued the Request for Authorization (RFA) checking the box for review on an “Expedited Basis” and requesting a supported living program at CNS from 04-22-2024 through 06-20-2024. (Ex. 1.) Under “other information” on the RFA form, Dr. Koh requests a 60-day supported living program “as current cancer treatment (nonindustrial) allows.” (Id.)

The RFA was submitted with Dr. Koh’s PR-4 report dated 03-22-2024. (Ex. 2.) Defendant notes that in the PR-4 is the result of an evaluation on 03-22-2024, and at that time, Dr. Koh deemed applicant permanent and stationary status and states because “no significant change is anticipated in the short term.” (Ex. 2 at 4.) Dr. Koh clarifies:

“The cancer is an unfortunate add-on to what was an already catastrophic serious chronic condition resulting from the patient’s head injury. Patient would benefit from ongoing care at CNS for increased independence and self-reliance as a way of managing his non-industrial cancer treatment in the context of his industrial cognitive and neurological impairments.” (Id., at 5.)

On 04-17-2024, defendant’s Utilization Review vendor issued a non-certify letter. (Ex. 4.) The denial was because applicant has reached permanent and stationary status and supported living programs are only recommended for select brain injury patients. (Id., at 2.)

On 05-06-2024, applicant’s clinical case manager at CNS Courtney Asbill, M.A., submitted a letter as part of an internal appeal to rebut UR, emphasizing the urgent need for applicant to receive the requested treatment. (Ex. 5.) The clinical case manager notes that the request would be amended to 30 days of the CNS Supported Living program “due to nonindustrial medical complications” meaning cancer treatment. (Ex. 5 at 1.) The appeal letter states that “(f)ailure to provide the support for such a program could result in numerous life and health threatening outcomes including but not limited to repeat hospitalizations, re-injury, and/or death.” (Ex. 4 at 2.)

IV. DISCUSSION

Labor Code section 4610(i)(3) mandates expedited review of an RFA within 72 hours of receipt of the RFA in the situation where:

1. the employee faces an imminent and serious threat to his or her health, including, but not limited to, the potential loss of life, limb or other major bodily function; or
2. the normal time limit for the decision-making process would be

detrimental to the employee's life or health or could jeopardize the employee's ability to regain maximum function.

If the RFA does not contain evidence required under Labor Code section 4610(i)(3), then utilization review must occur within the standard five working days. (8 C.C.R. 9792.9.1(c)(4).) Here, review of the RFA submitted for expedited review on 04-10-2024 did not occur until the UR decision of 04-17-2024, more than 72 hours allowed under the Labor Code.

Applicant's effects of the industrial injury to the head and brain affecting a constellation of basic bodily functions and activities of daily living including but not limited to: attention, memory, processing speed, executive functioning, speech dysfluencies; impaired balance and a risk of imminent falls; headaches, dizziness, tinnitus, blurred/impaired vision, and tremors; urge incontinence; forgetfulness; and he is in need of psychiatric care for his major depressive disorder and anxiety. Applicant is effectively precluded from any work. Further, applicant lacks family support. Applicant fits the first criteria for expedited review set forth in Labor Code section 4610(i)(3) as the effects of his injury have already resulted in serious harm in form of subsequent falls in March of 2023 and October of 2023.

Defendant contends that there was a 24-day lag between the evaluation of 03-22-2024 for the PR-4 followed by the RFA of 04-10-2024, and then there is no explanation as to why there is further delay in the start of the program for 13 days after the RFA was submitted for expedited review. However, under "other information," the RFA indicates a 60-day supported living program from April 22 to June 20, 2024 "as current cancer treatment (nonindustrial) allows." (Ex. 1.) A careful reading of Dr. Koh's specific request in the PR-4 is for applicant's "increased independence and self-reliance as a way of managing his non-industrial cancer treatment in the context of his industrial cognitive and neurological impairments." (Ex. 2 at 5, emphasis added.) [Discussion of the clinical case manager's subsequent letter omitted.]

As far as medical necessity is concerned, the PR-4 and the appeal letter dated 05-06-2024 show that there is a need for continued medical treatment due to deficits in executive functioning and physical functioning affecting activities of daily living. Failure to provide treatment will result in a decline in applicant's health and safety status. (Ex. 5 at 2.)

V. RECOMMENDATION

Based on the foregoing, it is respectfully requested that defendant's Petition for Reconsideration is **DENIED**.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of June 21, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 11, 2024

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

**JAMES MERRY
ASVAR LAW
FINNEGAN, MARKS, DESMOND & JONES**

DW/oo

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