WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LINDA BURTON, ***Applicant***

vs.

LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, permissibly self-insured;
Defendants

Adjudication Number: ADJ12874580; ADJ12874605
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 23, 2024

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

LINDA BURTON
SPARAGNA & SPARAGNA
HOMAN, STONE & ROSSI
TAPPIN & ASSOCIATES

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Defendant Los Angeles County Metropolitan Transit Authority (LACMTA) has, through its counsel, filed a timely, verified petition for reconsideration of the December 11, 2023 Joint Findings and Order Re: Medical Treatment, which ordered defendant LACMTA, permissibly self-insured, to authorize ongoing inpatient residential care at Casa Colina for applicant Linda Burton in admitted case number ADJ12874580, and to continue to authorize ongoing inpatient residential care at Casa Colina until a change in circumstances warranting cessation of residential care can be proven by defendants, pursuant to the reasoning in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board Significant Panel Decision), at which point submission of a request for authorization may properly be submitted to utilization review, along with supporting evidence of the change in material facts that warrants revisiting the decision to authorize ongoing inpatient care.

Defendant's petition arguments do not attempt to distinguish or rule out application of the reasoning in *Patterson*, but instead attacks the reasoning of *Patterson* itself, arguing that "**[t]o the extent that *Patterson* allows the Board to make decisions about the medical necessity of treatment for injured workers despite a timely utilization review, it violates the Legislature's intent behind establishing the utilization review and IMR processes, violates *Dubon II* and its progeny, and violates Court of Appeal cases interpreting both**" (Petition for Reconsideration, filed 12/27/2024, page 10, lines 5-8, bold in original).

Defendant's petition also focuses on the assertion that its utilization review (UR) non- certification of August 30, 2023 was timely because the requesting physician was not justified in checking the box marked "Expedited Review" on Form RFA, and that therefore defendant should have been allowed five working days, and not 72 hours, after receipt to respond to the August 22, 2023 request for authorization. Defendant argues that the finding and order is without or in excess of the Board's powers because it decides a medical treatment dispute that was addressed by a timely and valid UR determination. Defendant also asserts that its allegedly timely UR determination provides substantial medical evidence of a change in circumstances, that applicant's worsening condition constitutes a change in circumstances, and that therefore

the evidence does not justify the findings of fact. Defendant also asserts that a termination of medical care based on the adverse UR determination should not be considered "unilateral" as that term is used in paragraph 5 of the findings of fact, which reads as follows: "Defendant may not unilaterally cease to provide authorization for Ms. Burton's ongoing residential care at Casa Colina, because there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury."

Applicant filed a timely Answer through her attorney of record on January 2, 2024, and real party in interest Casa Colina Hospitals and Centers for Healthcare also filed a timely answer through its attorney of record on January 9, 2024. Both answers assert that defendant's UR determination was untimely, that expedited review was appropriately requested, and that *Patterson* was properly applied to this case, there being no evidence of a change in circumstances showing that care is no longer required.

II.
FACTS

The above entitled matter was submitted for decision with exhibits at an expedited hearing held on October 3, 2023. Based on the stipulations of the parties at the hearing, as well as the now- final Findings and Order of March 3, 2023, it was found that applicant Linda Burton, born May 1, 1961, while employed on August 6, 2019, as a bus operator, Occupational Group No. 250, at Los Angeles, California, by Los Angeles County Metropolitan Transit Authority (LACMTA), permissibly self-insured, sustained injury arising out of and in the course of employment to her back, neck, psyche, and shoulders (ADJ12874580, designated as the Master File at trial). The parties also stipulated that while employed during the period of December 1, 2024 through August 8, 2019 as a bus operator, Occupational Group No. 250, at Los Angeles, California, by LACMTA, permissibly self-insured, applicant claims to have sustained injury arising out of and in the course of employment to her back, neck, psyche, respiratory system, hypertension, urological system, bilateral shoulders, upper digestive system, bilateral wrists and hands, dermatology, and cognitive (ADJ12874605). In both cases, the parties stipulated that the employer has provided some medical treatment, and the primary treating physician (PTP) is Marlene Sangnil, M.D. (Minutes of Hearing and Summary of Evidence (MOH/SOE) of 10/3/2023, pages 2-3; Findings and Order for Additional Panel dated 3/3/2023, page 1, paragraphs 1-2).

The issues submitted for decision in both cases were as follows: (1) whether UR was timely, and specifically whether the Utilization Review (UR) of August 30, 2023 was timely; (2)whether under *Patterson vs. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board Significant Panel Decision) the defendant has to show a change in circumstances; (3) whether a change in circumstances is required to perform UR on a Request for Authorization (RFA); (4) whether there can be an order to allow care provider Casa Colina to provide ongoing residential care without the need to place applicant's continued care on recurring RFAs that trigger UR; (5) defendant requests an order for Casa Colina to create a discharge care plan pursuant to Labor Code section 4610 (I)(4)(C); (6) defendant requests an order that Jeffrey Kinney, RN, be permitted access to Casa Colina for observation and participation in a discharge plan; (7) applicant opposes the inclusion of issues five and six; (8) defendant opposes the inclusion of issue four (MOH/SOE of 10/3/2023, pages 2-4).

In addition to all previous exhibits and proceedings, of which judicial notice was taken, the following additional exhibits were admitted into evidence: a letter by adjuster Edward Low to the DCW Audit and Enforcement Unit dated September 25, 2023 Joint 9); an RFA with ring verification of Marline Sangnil, M.D. dated August 23, 2023 (Joint 10); a Genex In-Progress Notification dated August 29, 2023 (Joint 11); a Genex Recommendation to Non-Certify dated August 30, 2023 (Joint 12); a report of Barry Halote, Ph.D., dated June 14, 2023 (Joint 13); a report of Jonathan Wang, M.D., PQME in neurology, dated February 10, 2023 (Joint 14); an RFA and response to additional information by Marline Sangnil, M.D., dated February 7, 2023 (Joint 15); an RFA of Marline Sangnil, M.D., dated April 24, 2023 (Joint 16); and an RFA of Marline Sangnil, M.D., dated June 21, 2023 (Joint 17) (MOH/SOE of 10/3/2023, pages 4-5).

The findings of fact dated December 11, 2023 found that the provision of a nurse case manager is a form of medical treatment under Labor Code section 4600, as is Linda Burton's ongoing inpatient care at a residential program at Casa Colina (Joint Findings and Order Re: Medical Treatment dated 12/11/2023, page 2, numbered paragraph 4).

It was also found that defendant may not unilaterally cease to provide authorization for Ms. Burton's ongoing residential care at Casa Colina, because there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury (*Id*., page 2, numbered paragraph 5).

The findings of fact dated December 11, 2023 found that the use of an expedited hearing to address the medical treatment issue in this case is expressly authorized by Labor Code section 5502(b)(1) (*Id*., page 2, numbered paragraph 6).

It was ultimately found that the residential program at Casa Colina that was improperly non- certified by utilization review on August 30, 2023 is like the ongoing services of a Nurse Case Manager described in *Patterson vs. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board Significant Panel Decision), and that therefore it was not necessary as a matter of law for Casa Colina to send a Request For Authorization (RFA) form for Linda Burton to obtain ongoing authorization of Ms. Burton's ongoing inpatient care provided by Casa Colina, and any such RFA forms submitted by Casa Colina without evidence of a change in circumstances should not have been submitted to utilization review by defendant (*Id*., page 2, numbered paragraphs 7, 8). Defendant has the burden of proof to show a change in circumstances that would warrant termination of care of such an ongoing nature. Defendant has not met that burden at this time.

Defendant's requests that Casa Colina be ordered to create a discharge plan is denied without prejudice, and that Jeffrey Kinney, RN be permitted access to Casa Colina for observation and participation in a discharge plan, were denied without prejudice (*Id*., page 3, numbered paragraphs 10, 11). Applicant's request for an order that Casa Colina does not need to submit recurring RFAs was also denied without prejudice (*Id*., page 3, numbered paragraph 9).

Based on the foregoing findings, its was ordered that defendant LACMTA, permissibly self- insured, authorize ongoing inpatient residential care at Casa Colina for applicant Linda Burton in admitted case number ADJ12874580, and continue to authorize ongoing inpatient residential care at Casa Colina until a change in circumstances warranting cessation of residential care can be proven by defendants, pursuant to the reasoning in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910, at which point submission of a request for authorization may properly be submitted to utilization review, along with supporting evidence of the change in material facts that warrants revisiting the decision to authorize ongoing inpatient care (*Id*., page 3, fourth paragraph).

III.
DISCUSSION

The Significant Panel Decision in *Patterson vs. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 held that (1) the provision of a nurse case manager is a form of medical treatment under Labor Code section 4600; (2) an employer may not unilaterally cease to provide approved nurse case manager services when there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury; (3) use of an expedited hearing to address the medical treatment issue in this case is expressly authorized by Labor Code section 5502(b)(1); and (4) it is not necessary for an injured worker to obtain a Request For Authorization to challenge the unilateral termination of the services of a nurse case manager.

The *Patterson* opinion also held that "[a]pplicant has no obligation to continually show that the use of a nurse case manager is reasonable medical treatment," reasoning that defendants should have the burden of proof to show a change in circumstances that would warrant termination of care of an ongoing nature, or submission of such care to utilization review. Based on the reasoning of the Significant Panel Decision in *Patterson*, cited above, it was found that defendants may not unilaterally cease to provide residential care at Casa Colina TLC to Linda Burton because there is no evidence of a change in circumstances that would warrant a new utilization review determination of whether the previously authorized treatment should continue to be authorized. No such change in circumstances has been shown by any of the exhibits in evidence, so defendants have not met their burden at this time.

It was found that the residential program at Casa Colina improperly non-certified by utilization review on August 30, 2023 is more like the ongoing services of a Nurse Case Manager described in *Patterson* than not. Some forms of medical treatment do require periodic renewal and review, such as a prescription for OxyContin, Norco, and Lyrica as noted in the panel decision in *McCool v. Monterey Bay Medicar*, 2014 Cal. Wrk. Comp. P.D. LEXIS 578, but a residential rehabilitation program, unlike a prescription for narcotics, does not require repeated renewal for reasons pertaining to the patient's health and well-being. To place arbitrary time limits on such ongoing services would be completely antithetical to the rationale for the *Patterson* decision and endanger the injured worker. Although the *Patterson* case itself involved Nurse Case Management services, its reasoning has been applied to several other kinds of medical treatment, including home health care services (*Kumar v. Sears Holding*

Corp. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 502; *Darlene Ferrona v. Warner Brothers* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 220; *Gaylynn Dewey v. Object Geometries, Inc. (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 255; William Romo v. Pacific Bell Telephone Company* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 525; *Ruthiea Avist v. UC San Francisco Medical Center* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 254; *Silvia Zucchi Paz v. Tinco Sheet Metal* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 403), medical transportation (*Gunn v. San Diego v. San Diego Dept of Social Services* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 414), non-medical transportation (*Ramirez v. Kuehne and Nagel, Inc*. (2014) 2014 Cal. Wrk. Comp.P.D. LEXIS 537; *Rabenau v. San Diego Imperial Counties Development Service Incorporated* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 97), an assisted living facility (*Duncan v. County of Ventura* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 131), and, squarely in line with this case, the Casa Colina Transitional Living Center (*Tinsley v. Vertis Communications* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 575, concurring opinion of Commissioner Sweeney). Accordingly, the reasoning in *Patterson* should apply in this case, eliminating the need for repeated utilization review every four weeks, or at any other interval, absent a change in circumstances that would warrant a new utilization review determination regarding applicant's need for inpatient care at Casa Colina. No such change in circumstances has been shown in this case, and so the inpatient care should continue to be authorized per the utilization review certification of March 11, 2022 until such time as defendants can meet their burden of proving such a material change under the rationale of *Patterson*. Such a change should be a change in material facts, and not merely a change of opinion by an expert, or by a utilization reviewer whose opinion was obtained in violation of the principles of the *Patterson* significant panel decision. This answers issue number 3, whether a change in circumstances is required to perform UR on the portion of any RFA requesting ongoing care at Casa Colina, in the affirmative.

Because the *Patterson* issues, identified at trial as issues 2 and 3, were decided in applicant's favor, the issue identified as issue number 1, whether the adverse utilization review determination of August 30, 2023 was timely, was considered to be moot (Opinion on Decision dated 12/11/2023, page 8, paragraph 2). Any utilization review determination non-certifying inpatient residential care at Casa Colina, even a timely one, is invalid *ab initio* because defendants have not yet proven a change in circumstances following authorization of residential care at the TLC that would have warranted its cessation, or the re-submission of that ongoing care to utilization review.

However, the issue identified as issue number 4 at trial, requesting an order that Casa Colina does not need to submit recurring RFAs, is denied without prejudice, because Casa Colina should be able to follow the law as explained in this opinion and the *Patterson* Significant Panel Decision, as long as that remains the law and until if and when there is a change of circumstances. To issue an ongoing order that no more RFAs are needed would deprive Casa Colina of the medical discretion to decide whether and when there has been a change in circumstances that alters its treatment recommendations. If defendants misapply the reasoning of this decision and *Patterson* to unilaterally terminate authorization of treatment at Casa Colina without evidence of a change in circumstances, applicant's counsel may request another expedited hearing to enforce applicant's rights under *Patterson* just the same as if the requested order, which is potentially problematic, were issued, Because this request for an order that RFAs are no longer necessary is denied without prejudice, defendant's objection to the issue (identified as issue number 8) is moot.

With respect to defendant's request that Casa Colina be ordered to create a discharge plan, identified as issue number 5, that request was denied without prejudice because the course of medical treatment should be determined by treating physicians, subject to UR and IMR where applicable (and not subject to UR and IMR where inapplicable, for reasons explained in *Patterson* and in this opinion). Defendant's request that Jeffrey Kinney, RN be permitted access to Casa Colina for observation and participation in a discharge plan, which is issue number 6, is also denied, without prejudice. The Patterson Significant Panel Decision holds that the services of a nurse case manager constitute medical treatment under Labor Code section 4600, and accordingly applicant should have the right to select the nurse case manager (or any nurse actively and interactively managing medical care, regardless of title) from defendant's MPN after 30 days from the sate the injury is reported, as dictated by Labor Code section 4600(c). The denial of these requests is without prejudice to defendant's right to conduct its own discovery, which might include surveillance, obtaining records from Casa Colina, deposing individual witnesses at Casa Colina, and consulting with nurses or even physicians of its own selection (which would include an evaluation by a defense- appointed physician under Labor Code section 4050, although the admissibility of such materials would be constrained by existing law). Because defendant's issues 5 and 6 are denied, without prejudice, applicant's objection to these issues, identified as issue number 7, is moot.

Accordingly, it was ordered that defendant LACMTA, permissibly self-insured, authorize ongoing inpatient residential care at Casa Colina's

Transitional Living Center (TLC) for applicant Linda Burton in admitted case number ADJ12874580, and continue to authorize ongoing care at Casa Colina until a change in circumstances warranting cessation of residential care can be proven by defendants, pursuant to the reasoning in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910, at which point submission of a request for authorization may properly be submitted to utilization review, along with supporting evidence of the change in material facts that warrants revisiting the decision to authorize ongoing inpatient care.

The decision herein was, as stated in the last paragraph of the opinion on decision, expressly without prejudice to the parties' rights to revisit the issue in a manner consistent with the decision herein and any new medical, legal, and/or factual developments, and to conduct ongoing discovery regarding Ms. Burton's ongoing treatment.

The undersigned respectfully disagrees with defendant's argument against the holding in *Patterson*, that allowing the Board to make decisions about the medical necessity of treatment for injured workers despite a timely utilization review violates the Legislature's intent behind establishing the utilization review and IMR processes, violates *Dubon II [Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc).] and its progeny, and Court of Appeal cases interpreting this issue. On the contrary, the whole point of *Patterson* is that a Form RFA is not required in certain circumstances involving care of an ongoing nature. The decision is about when an RFA is required, and if one is not required in the first place, then there can be no valid UR therefrom, timely or otherwise. Defendant's assertion that its utilization review (UR) non-certification of August 30, 2023 was timely is therefore moot in light of the application of the reasoning in *Patterson*. Also moot is the argument that the requesting physician was not justified in checking the box marked "Expedited Review" on Form RFA, and that therefore defendant should have been allowed five working days, and not 72 hours, after receipt to respond to the August 22, 2023 request for authorization. However, to the extent that those arguments are found to be of any interest, they are thoroughly repudiated in the answers of both applicant and Casa Colina.

Defendant's argument that its allegedly timely and valid UR determination provides substantial medical evidence of a change in circumstances is inapplicable because the UR should never have been issued in the first place under the reasoning in *Patterson*, as explained above. Defendants' claim that evidence of applicant's worsening condition constitutes a change in circumstances warranting cessation of treatment also fails, insofar as the

deterioration of applicant's condition does not support the termination of authorization for treatment, but on the contrary provides even greater support for the request. If defendant's issue is with the provider, then a petition could be filed to change applicant's treating physician after applicant has assumed medical control in selection of treating physicians; or, hypothetically, defendant could revoke Casa Colina's Medical Provider Network (MPN) status then attempt to move applicant into any other MPN provider, but that is not the case here.

Defendant's assertion that a termination of medical care based on the adverse UR determination should not have been called "unilateral" seems to misunderstand the meaning of the word "unilateral." The first definition for the word "unilateral" in the Miriam-Webster online dictionary is "done or undertaken by one person or party" (*See* https://www.merriam-webster.com/dictionary/unilateral). While defendant's UR reviewer and its claims examiner are two different persons, the decision whether or not to follow an adverse UR determination is entirely up to one party, the defendant. Furthermore, there are at least two parties to this case (three if you count party in interest Casa Colina, the provider), and unless two or more parties agree to a course of action, the undersigned stands behind characterizing that course of action as "unilateral" just as the decision in *Patterson* seems to have meant when using that word. A bilateral cessation of care would be the correct term if applicant agreed to it, but that is not the case here.

IV.
RECOMMENDATION

It is respectfully recommended that the petition be denied.

Date: 1/11/2024

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE