WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROGELIO TOSCANO, *Applicant*

vs.

ELITE EARTHWORKS & ENGINEERING.;
REDWOOD FIRE & CASUALTY INSURANCE COMPANY,
administered by BERKSHIRE HATHAWAY, *Defendants*

Adjudication Number: ADJ17821210
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, and for the additional reasons given below, we will deny reconsideration.

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 14, 2025, and 60 days from the date of transmission is Friday, September 12, 2025. This decision is issued by or on Friday, September 12, 2025, 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 14, 2025, and the case was transmitted to the Appeals Board on July 14, 2025. 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 14, 2025.

In addition to the reasons set forth in the WCJ's Report, we note that in *Allied Signal Aero. v. Workers' Comp. Appeals Bd.* (*Wiggs*) (2019) 35 Cal.App.5th 1077 [86 Cal.Comp.Cases 367], the issue was both an increase in the level of care and whether defendant agreed to waive utilization review or refer it to a nurse for alternative dispute resolution on a one-time basis. In contrast, the issue in the present case is whether ongoing brain injury rehabilitation care at the Centre for Neuro Skills, which had already been certified as reasonable and necessary through the utilization review process on July 22, 2024 and provided by defendants, should have been sent for a redundant subsequent utilization review absent any evidence that material facts had changed. The WCJ correctly applied the reasoning in *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910 (Appeals Board Significant Panel Decision), and *National Cement Co. v. Workers' Comp. Appeals Bd.* (*Rivota*) (2021) 86 Cal.Comp.Cases 595 (writ denied), both of which are cited in the Report, to find that defendants had not met their burden to show a change of circumstances in order to

permit further utilization review of the ongoing brain injury rehabilitation care. Under *Patterson* and *Rivota*, the WCAB has jurisdiction to determine whether there has been such a change in circumstances, notwithstanding the provisions for utilization review in California Labor Code section 4610 and for independent medical review in section 4610.5.

In *Rivota*, the Second District Court of Appeal upheld the Appeals Board's application of *Patterson*, noting the following language in *Patterson*:

> Defendant acknowledged the reasonableness and necessity of [the medical treatment at issue] when it first authorized [that treatment], and applicant does not have the burden of proving [its] ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the [treatment] is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization [RFA] and starting the process over again.

(*Patterson*, *supra*, 79 Cal.Comp.Cases 910 at p. 918.)

While *Patterson* involved the ongoing provision of Nurse Case Manager services, *Rivota* noted that the same reasoning should apply to an inpatient care program:

> [T]he principles advanced in [*Patterson*] apply to other medical treatment modalities as well. Here ... Applicant had continued need for placement at Casa Colina. Further, [applicant's witness] stated that there was no change in Applicant's circumstance and no reasonable basis to discharge Applicant from care. The WCJ ... concluded that Applicant's continued care at Casa Colina was necessary, without ongoing RFAs, to ensure Applicant's safety and provide him with a stable living situation and uninterrupted medical treatment.

(*Rivota*, *supra*, 86 Cal.Comp.Cases 595 at p. 597.)

The inpatient medical care in *Rivota* is analogous to the outpatient care that was authorized and provided to the applicant in the present case. Thus, following the reasoning in *Patterson* and *Rivota*, defendants must show a change in circumstances, by way of medical evidence, before resubmitting applicant's previously approved request for ongoing brain injury rehabilitation care to utilization review. A second utilization review of the same care is not permitted until defendants can meet their burden of proving a change of circumstances to justify what would otherwise be a redundant review. Accordingly, the utilization reviews of September 13, 2024 and October 24, 2024 in this case are invalid, because defendants did not satisfy their burden of establishing a material change in circumstances. The utilization review determination that defendants obtained

in contravention of the principles set forth in *Patterson* is not in and of itself sufficient evidence of a change in circumstances.

The California Supreme Court declined to review this same line of reasoning in *Los Angeles Metropolitan Transit Authority v. W.C.A.B. (Burton)* (2024) 89 Cal. Comp. Cases 977, 980 (review denied), where it was held that:

> … [T]he 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 [utilization review] therefrom, timely or otherwise. …
>
> Defendant's argument that its allegedly timely and valid [utilization review] determination provides substantial medical evidence of a change in circumstances is inapplicable because the [utilization review] should never have been issued in the first place under the reasoning in *Patterson*, as explained above.

(*Burton, supra,* 89 Cal. Comp. Cases 977, at 980.)

As explained in the WCJ's Report, the defendants in the present case have not met their burden of proof to show that there has been a change of circumstances since home care was found to be reasonable and necessary on July 22, 2024. None of the exhibits admitted at expedited hearing on March 19, 2025 provide substantial medical evidence of a significant change in applicant's medical condition.

Accordingly, for the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I DISSENT (see attached dissenting opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 29, 2025

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

ROGELIO TOSCANO
THE LAW OFFICE OF ARASH KHORSANDI
QUINTAIROS, PRIETO, WOOD & BOYER

CWF/*cs*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Due to the prolonged absence of WCJ Hursh, the Presiding Judge of the VN Office has designated the undersigned to prepare the Report and Recommendation in response to the Petition for Reconsideration on file herein.

INTRODUCTION

The Injured employee is a 46 year old caterpillar operator who sustained a significant brain injury at work on 11/21/2022. The Petitioner is the Defendant who has filed a timely and verified Petition for Reconsideration claiming that the WCJ erred by finding that the Utilization Review Determination de-certifying ongoing out patient rehabilitation care was invalid under *Patterson v. The Oaks Farm* (2014) 79 CCC 910. The undersigned will recommend that the Petition be denied.

STATEMENT OF FACTS

As stated above, this Applicant sustained a brain injury on 11/21/2022 when his head struck a metal pole resulting in subdural hematomas requiring brain surgery. He has remained under the care of the primary treating physician, Vibhay Prasad M.D. at the Centre for Neuro Skills.

By report dated 9/16/2023 Dr. Prasad set forth detailed symptoms such as dizziness, sleep disturbance, shaking, emotional control, blurred vision, loss of concentration etc. (Ex. 1). In January, 2024 UR certified out patient brain rehabilitation at this facility (Ex. 2). The request was for 4 hours per day/ 5 days per week initially for 4 weeks (80 Hours). It was certified (Ex. 2). The program was well documented by Dr. Prasad. This program of ongoing out patient rehabilitation continued through September, 2024 with ongoing UR certifications (Ex. 3 – 6).

On 10/24/2024 Dr. Prasad issued another RFA requesting additional on going rehabilitation (Ex. Y-2). There was no change in the prescription. On 10/31/2024 UR issued a de-certification this time attaching a 44 page Peer Review report (Ex. Y-3). Of interest is the last report from the Centre for Neuro Skills dated 10/18/2024 reviewed on pp. 8-9 in the Peer Review Report. He states in support of his request for ongoing treatment:

"Reason for specialty program: continues to have headaches, ongoing dizziness and poor sleep; intensive counselling continues to be required to address feelings of frustration and difficulty controlling emptions outside of the clinic with further training on strategies to effectively manage stressful situations; to improve divided and alternating attention and multi-tasking needed for participation in community and vocational tasks; to improve memory and ability to problem solve, organize, to manage personal and vocational responsibilities independently; continue to improve strength and endurance; challenges with ocular motility persist, experienced visual fatigue and dizziness negatively impacting overall performance to participate independently in novel and busy environments."

Dr. Prasad issued an appeal dated 11/19/2024 (Ex. 7). He states:

"Rogelio continues to require intensive counseling services to address emotional deficits and trauma-based exacerbation of anxiety for safe transition back to community based activities during this transition. He also continues to display impairments in the ability to make decisions, including poor planning, and processing delays, that will affect his overall personal safety during activities of daily living….."

Apparently on 1/3/2025 Dr. Prasad's office again filed an RFA requesting that the ongoing rehabilitation therapy continue. On 1/14/2025 again the request was de-certified by UR (Ex. A). However a review of the histories taken recently reveal not an improvement but a worsening of Applicant's multiple symptoms such as dizziness, headaches, disrupted sleep, tinnitus, numbness, memory loss, blurred vision all noticed since therapy terminated.

An expedited hearing was held before WCJ Hursh on 3/19/2025. The WCJ determined that the medical evidence set forth in the peer review reports failed to demonstrate any significant change in condition. The rehabilitation program was ongoing treatment having been instigated since January, 2024. Hence the WCJ invoked the rule of *Patterson v. The Oaks Farm* (2014) 79 CCC 910. He invalidated the UR Determination indicating that the Petitioner could not unilaterally discontinue previously authorized ongoing care without a showing of a significant change of condition. He invoked the Appeals Board's jurisdiction to find that the treatment requested was reasonably necessary to cure or relieve the Applicant of the effects of the injury and ordered the Defendant to provide same.

Petitioner now claims that the WCJ lacked jurisdiction to order treatment the determination of which is solely conducted under Utilization Procedures in Cal. Lab. Code sec.4610.

DISCUSSION

In *Patterson v. The Oaks Farm (supra)* the Appeals Board recognized an exception to utilization rules in cases where ongoing treatment is being renewed. The case specifically indicates that the employer cannot unilaterally discontinue ongoing authorized care unless a change of condition would recognize the need to discontinue or modify the ongoing treatment plan. In *National Cement Company Inc. v. WCAB (Rivota)* (2021) 86 CCC 595, *writ denied* the Appeals Board confirmed the *Patterson* rule in a case involving a brain rehabilitation treatment plan quite similar to the treatment requested by Dr. Prasad herein.

As *Patterson* noted:

"Defendant acknowledged the reasonableness and necessity of the medical treatment at issue when it first authorized that treatment, and applicant does not have the burden of proving its ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the treatment is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new RFA and starting the process over again."

Petitioner urges reliance upon *Allied Signal Aerospace v. WCAB (Wiggs) (2019)* 35 Cal. App.5th 1077, 84 CCC 367. However *Wiggs* is off point since the medical care in that case (home housekeeping) was being increased by way of a new RFA. Under those circumstances the ongoing "care" was being modified or changed, and under those circumstances UR is required since it involved a new request for care rather than a continuation of care already in place.

Petitioner's claim that Applicant no longer needs the treatment because he is not improving or the condition is not helping any longer is a subject that should be discussed with the treating physician.

In this case, the evidence provided by Dr. Prasad strongly suggests that ongoing outpatient rehab services continue to be needed to return Applicant to reasonable activities of daily living due to a severe brain injury.

On the contrary, the reports from Dr. Prasad give no information to suggest that there is a significant change in circumstances that would justify termination of the rehabilitation plan in which Applicant is participating.

Hence pending any evidence that there is a significant change of condition, the WCJ was correct to order the treatment requested by Dr. Prasad to be continued without intervening UR determination. Under the findings of *Patterson,* the WCJ does have jurisdiction to (1) determine if the UR findings should be stricken, and (2) to make a finding of fact that the care requested by Dr. Prasad was reasonably necessary to cure or relieve the Applicant.

RECOMMENDATION

Based upon the law and facts set forth above, it is respectfully recommended that the Petition for Reconsideration be DENIED.

DATE: July 14, 2025

Dean Stringfellow
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DISSENTING OPINION OF COMMISSIONER RAZO

I dissent. The Appeals Board Significant Panel Decision in *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910 did not carve out a valid exception to California Labor Code section 4610. Reliance on *Patterson* here is misplaced. Under section 4610 the defendants are required to conduct utilization review (UR) on every request for authorization of medical care, and neither statutes nor regulations provide that a prior authorization precludes future UR. In this case we have a procedurally correct and timely UR. The only appeal permitted from this UR is an independent medical review (IMR) obtained pursuant to Labor Code section 4610.5, and it is not subject to the jurisdiction of the Appeals Board.

Although the Appeals Board has no jurisdiction to question the medical expertise behind the UR determination, I note that it appears to be soundly based on the American College of Occupational and Environmental Medicine (ACOEM) Traumatic Brain Injury Guideline of November 15, 2017, which was incorporated into the Medical Treatment Utilization (MTUS) by Cal. Code Regs., tit. 8, section 9792.24.5. These MTUS criteria, which are presumptively correct under Cal. Code Regs., tit. 8, section 9792.21, are not even discussed by applicant's treating physicians. I am troubled by the assertion of these physicians that applicant requires months of ongoing treatment without any evidence of benefit or improvement. Accordingly, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 29, 2025

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

ROGELIO TOSCANO
THE LAW OFFICE OF ARASH KHORSANDI
QUINTAIROS, PRIETO, WOOD & BOYER

CWF/*cs*

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