WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SYDNEY COHEN, *Applicant*

vs.

FITNESS 19; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ6861349
Anaheim 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.[1] Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We note that former Labor Code[2] 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, 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.

[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in her place.
[2] All further statutory references are to the Labor Code, unless otherwise noted.

Under 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 December 24, 2024, and 60 days from the date of transmission is Saturday, February 22, 2025. The next business day that is 60 days from the date of transmission is Monday, February 24, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision is issued by or on Monday, February 24, 2025, so that we have timely acted on the petition as required by section 5909(a).

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 December 24, 2024, and the case was transmitted to the Appeals Board on December 24, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 24, 2024.

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/ KATHERINE A. ZALEWSKI, CHAIR

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 24, 2025

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

SYDNEY COHEN
LAW OFFICES OF PHILIP M. COHEN
LAW OFFICE OF ALAN PAIK

PAG/kl

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION/REMOVAL

BACKGROUND:

Applicant filed a timely verified Petition for Reconsideration/Removal subsequent to a Findings and Award issued on November 27, 2024 wherein the court found that Applicant's dental/TMJ conditions were a compensable consequence of her original injury. Further, the Court found that Defendant was in fact responsible for treatment but the nature and extent of that treatment is subject to the utilization review process. It is this finding that this Petition for Reconsideration and Removal is based.

APPLICANT'S PETITION:

Applicant contends that the Court should have awarded the recommended medical treatment because Defendant's deferral of utilization review was invalid and that substantial evidence supported the recommended treatment.

DISCUSSION:

After trial the Court found as follows:

1. *Applicant has TMJ/dental problems that are a compensable consequence of her cumulative trauma injury to her back and psyche.*
2. *There is a need for treatment to cure or relieve from the effects of the injury.*
3. *Request for Authorization (RFA) from Dr. Tran was received by the carrier on 1-4-2024.*
4. *Request for Authorization (RFA) from Dr. Tran was received by the carrier on 8-28-2024.*
5. *A timely Utilization Review (UR) deferral notice was sent out by Defendant in response to each RFA as allowed by Labor Code section 4610.*
6. *In light of finding #1, retrospective Utilization Review of each RFA submitted by Dr. Tran is warranted to ascertain type and extent of treatment.*

With respect to treatment for the TMJ/dental problems the Court stated

> N*o one declined to recommend treatment. Dr. Tran outlined a course of treatment [Ex 66, P8-9] and submitted an RFA [Ex 63]. Defendant responded timely to the RFA by deferring*

a utilization review (UR) decision because the dental injury was not an accepted part of the claim [Ex L].

This is keeping with the dictates of Labor Code section 4610(l) which says:

Utilization review of a treatment recommendation shall not be required while the employer is disputing liability for injury or treatment of the condition for which treatment is recommended ….

Applicant argues that the Court should have awarded the dental treatment recommended by Dr. Tran despite the UR deferral by Defendant who was challenging the compensability of the TMJ/dental injury. The reason, according to Applicant, is that the deferral was invalid because Defendant didn't provide Applicant with an appropriate explanation why liability was disputed when the evidence clearly showed a connection between Applicant's injury and her TMJ/dental problems. Applicant referred to *Illinois Midwest Ins. Agency, LLC v. WCAB*, 80 CCC 744 (2015) where the Board panel found the

… medical record was clearly sufficient to establish industrial causation based on the uncontradicted reporting of three doctors indicating that Applicant suffered an industrial injury, that he required spinal surgery as a result of the injury, and that he required the treatment for which authorization was requested as a result of the surgery.

Here Applicant asserts the circumstances are the same as in *Illinois Midwest*, because "*the multiple undisputed, uncontradicted medical reports in this case supported a compensable consequence injury and there was no contrary evidence."* This, however, is not quite the situation[3].

Labor Code section 4610(l) states that utilization review is not required while there is a dispute over the injury or treatment. In expansion of that directive, 8 CCR 9792.9.1(b) allows that

Utilization review of a medical treatment request made on the DWC Form RFA may be deferred if the claims administrator disputes liability for either the occupational injury for

[3] In *Illinois Midwest* the denial of liability for the entire claim was late, whereas here benefits were being provided and the denial was only for a relatively new claim of an additional body part being injured upon somewhat unreliable evidence to support it.

which the treatment is recommended or the recommended treatment itself on grounds other than medical necessity.

The regulation goes on to advise that when there is disputed liability Defendant "*may, no later than five (5) business days from receipt of the DWC Form RFA, issue a written decision deferring utilization review of the requested treatment*" and that the written decision must be sent to the physician, injured worker, and workers' attorney. The notice must indicate when the RFA was received, a description of the treatment being requested, a "clear, concise, and appropriate explanation of the reason for the claims administrator's dispute of liability for the treatment.

Although Applicant contends the deferral notices here are defective and inadequate, and therefore inapplicable, the items admitted into evidence show that on January 8, 2024 a deferral notice in compliance with section 4610 and regulation 9792.9.1(b) was sent by Defendant to Dr. Tran within 4 days of receipt of his RFA for dental treatment. The deferral notice listed the physician's treatment recommendations and indicated that "dental" was an unlisted body part. The other required notices were included and copies of the deferral were sent to Applicant and her attorney, among others [See Ex K].

What Applicant fails to note is a detailed explanatory objection letter sent to Applicant's attorney including the author's suggestion about use of a "*QME panel in dentistry so that we get a med legal report addressing the dental issues. Attached is a Joint Request for an Additional Panel that I recommend we send to the Medical Unit.*" [Ex J]. The parties then proceeded to later utilize a QME, Dr. Hagstrom, whose report muddied the waters when discussing the cause of the dental problems[4].

A second deferral notice was sent to Dr. Tran in August, within one day of receiving his second RFA, again advising "dental is not listed as compensable" [Ex L]. The second notice may not have been necessary *[Arteaga v. Starcrest Prods. of Cal., Inc.*, 2024 Cal. Wrk. Comp. P.D. LEXIS 348].

[4] Defendant did object to Dr. Hagstrom's reporting [See EAMS Doc ID #54001847]

The circumstances here[5] are nothing like the silence that emanated from the defendant in the Illinois case referenced by Applicant.

Labor Code section 4610(l) doesn't require an explanation beyond a statement that liability is disputed. Moreover, the fact that Defendant was disputing TMJ/dental condition as a compensable consequence was not new to Applicant, it was a disputed medical issue for many years and the subject of prior hearings [See EAMS Doc ID #73460424]. Moreover, as was discussed in the Opinion on Decision out of which Applicant's current petition arose [EAMS Doc ID #78625465] all of the medical evidence was not so overwhelmingly convincing as to suggest Defendant should not have declined liability. With respect to whether Applicant's TMJ/dental problems are related to or a result from cumulative trauma injury to her back and psyche[6], the Court discussed each of the medical opinions (from Dr. Rosenson, Dr. Hagstrom, and Dr. Tran).

Dr. Rosenson thought that Applicant had a repetitive motion injury involving her neck as well as her back [Ex 53, P1] and that the cervical trauma progressed to "*a temporomandibular joint/myofascial pain disorder*" [Ex 53, P5]. This opinion concerning a relationship between Applicant's back injury and her TMJ/dental issues was undermined by lack of supporting factual evidence:

> *In March 2014, Applicant was examined by a QME in orthopedics, Dr. Gupta, with there being neither (sic) mention, nor findings, of any neck problems [Ex 30, P2]. It is also noted that Applicant raised no claim in the initial trial in 2014 about a repetitive injury to the neck.*
>
> *There was documentation of a neck injury in the records of Dr. Latufo, which reflect a history that on 10/5/10 Applicant was "rear-ended at a stop sign" with "neck pain severe since accident. Never had that before" [Ex I, P0096; see also Ex H, P1]. Obviously, the auto accident is not related to the claim of cumulative injury.*

[5] It also should be noted the matter was scheduled for a hearing on 10/8/24

[6]The original findings and award found injury to back and psyche, noting "no evidence of a brain injury" [4/13/15 F&A, P2]

[OPINION, P6, section A]

Understandably, Dr. Rosenson's opinion could not be relied on regarding liability for the TMJ/dental problems.

The PQME, Dr. Hagstrom, issued a report in July 2014 in which he blamed the TMJ/dental problems on *"direct result of several work related direct traumas. The onset of symptoms corresponds directly with the description of the direct impact to the head and face with a traumatic blow to the head. She reports no other previous medical conditions or injuries."*
[Ex 67, P17]

However, this is a continuing trauma case and there is no history in the rather lengthy medical Record of repetitive trauma to Applicant's head. Applicant did testify at the hearing on 10/8/24 to once bumping her head while walking near a machine, and to being struck on the head once while working with a training customer [10/8/24 SOE, P4, L15-18]. However, there is a bit of a credibility issue with respect to this testimony inasmuch as these incidents were never reported as injury events to any physician treating or evaluating Applicant. Moreover, these are two specific traumatic incidents, not a "cumulative" trauma. Consequently, the Court was disinclined to rely on Dr. Hagstrom's opinion on causation here, and could understand why Defendant would not.

The third report, by Dr. Tran, explained that Applicant has back pain and that this pain leads to grinding of teeth, which then leads to the TMJ/dental problems of the type from which Applicant suffers [Ex 64, P5]. This was a more plausible explanation consistent with Applicant's testimony. The Court relied on this opinion to find that the TMJ/dental problems are in fact a compensable consequence of the Applicant's cumulative back injury.

CONCLUSION:

To suggest the medical record clearly supported a compensable consequence injury overstates the quality and reliability of the evidence presented. The argument postulated by Applicant that essentially Defendant should have accepted the relationship between Applicant's back injury and her TMJ/dental problems and not have deferred UR of Dr. Tran's RFA because *all* the evidence is favorable to Applicant is not persuasive. There is no reason why Defendant should

have accepted liability and provided treatment on medical opinions from Dr. Rosenson and Dr. Hagstrom based on an inaccurate or deficient history.

Dr. Tran outlined a course of treatment [Ex 66, P8-9] and submitted an RFA [Ex 63]. Defendant responded timely to the RFA by deferring a utilization review (UR) decision because the dental injury was not an accepted part of the claim [Ex L]. Under the circumstances, with the compensability of the TMJ/dental problems being questionable, deferral was appropriate. This is keeping with the dictates of Labor Code section 4610(l) which says, "*Utilization review of a treatment recommendation shall not be required while the employer is disputing liability for injury or treatment of the condition for which treatment is recommended* …." This is not a *Dubon*[7] situation because the deferrals were done timely and UR was not yet required. A retrospective utilization review of the propriety of the recommended treatment is now warranted in light of the fact that Applicant's dental/TMJ problems were found to be a compensable consequence of her original injury [See Labor Code section 4610(m)]. Absent the Petition for Reconsideration that utilization review would have been due in the next few weeks.

RECOMMENDATION:

There was a final determination of liability for TMJ/dental problems. There was also a final determination that treatment was warranted and an award for it issued. As such a Petition for Reconsideration is the proper vehicle to challenge any findings regarding treatment. For the reasons stated above, the Petition for Reconsideration should be denied.

Notice is hereby given that this matter was transmitted to the Reconsideration Unit on the below date.

DATE: 12/24/2023

Marco Famiglietti
WORKERS' COMPENSATION JUDGE

[7]*Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 [If utilization review decision is untimely, determination of medical necessity may be made by WCAB based on substantial medical evidence]