WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTOR CRUZ, *Applicant*

vs.

CHANNEL DEVELOPMENT, INC.;
PREFERRED PROFESSIONAL INSURANCE COMPANY,
administered by OMAHA NATIONAL, *Defendants*

Adjudication Number: ADJ17686288
Marina del Rey District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings, Order and Award (F, O &A) issued on February 4, 2025 by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant requires further and continuing medical treatment at the Centre for Neuro Skills and Awarded such further and ongoing treatment.

Defendant contends that the WCJ lacks jurisdiction for such finding and acted in excess of his power and authority due to a timely RFA denial of treatment.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report 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 reasons discussed below, we will deny defendant's petition for reconsideration.

I.

Former Labor Code section 5909[1] 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.

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 March 11, 2025, and 60 days from the date of transmission is Saturday, May 10, 2025. The next business day after 60 days from the date of transmission is Monday, May 12, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on May 12, 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

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

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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 March 11, 2025, and the case was transmitted to the Appeals Board on March 11, 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 March 11, 2025.

II.

With respect to the assertion by petitioner that the WCJ's Award "far exceeds" the treatment recommendations of the request for authorization (RFA) from applicant's primary treating physician, Vibhay Prasad, M.D. (Petition, p. 8.), the WCJ's Award provides for "further and ongoing medical treatment at the Centre for Neuro Skills." Such Award is supported by the Findings of Fact, numbered paragraph 4, which states, "Applicant requires further and continuing medical treatment at the Centre for Neuro Skills," which is in turn justified by the reasoning of the significant panel decision in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Significant Panel Decision).

Further, in addition to the reasons set forth in the WCJ's Report, we observe that petitioner's reliance on the case of *Allied Signal Aero. v. Workers' Comp. Appeals Bd. (Wiggs)* (2019) 35 Cal.App.5th 1077 [84 Cal.Comp.Cases 367] in support of the assertion that the Appeals Board has no jurisdiction to review the medical necessity and reasonableness of home health care is misplaced. *Wiggs* does not negate the reasoning of the significant panel decision in *Patterson v. The Oaks Farm*, 79 Cal.Comp.Cases 910, and it does not stand for the proposition that there has to be a specific agreement to displace the utilization review (UR) process set forth in Labor Code section 4610. In *Wiggs,* the Appellate Court held that the evidence in that particular case was insufficient to support a finding that the parties had stipulated to use a specific registered nurse on an ongoing basis as the arbiter of whether housekeeping services were reasonable and necessary, (*Wiggs, supra,* 35 Cal.App.5th 1077, 1080 [84 Cal.Comp.Cases 367, 368-369].) The Court in *Wiggs* found that the parties had only agreed to use the services of the registered nurse on one occasion to form a single assessment of home care needs in 2012. Thus, *Patterson* was not

applicable to the facts in *Wiggs* because the defendants had "through the UR process, authorized the requested home care and only denied the request for an intensification of home care in 2015" (*Wiggs, supra,* 35 Cal.App.5th 1077, 1086 [84 Cal.Comp.Cases 367, 374].)

In the present case, unlike in *Wiggs*, there was no request for intensification of the level of care. The level of care previously authorized by UR was exactly the same as the level of care subsequently not authorized by UR: four hours per day, five days per week of post-acute day treatment neurorehabilitation. (*See* Utilization Review Authorization, Post Acute, dated 2/23/2024, admitted as Applicant's 4; Utilization Review Authorization, Post Acute, dated 4/24/2024, admitted as Applicant's 6; Utilization Review Authorization, Post Acute, dated 6/11/2024, admitted as Applicant's 7; Utilization Review Authorization, Post Acute, dated 9/6/2024, admitted as Applicant's 8; Utilization Review Denial of 10/30/24 RFA, dated 11/1/24, admitted as Defendant's H).

As noted in the WCJ's Report, there is insufficient evidence of any change in circumstances that would justify discontinuation of four hours per day, five days per week of neurorehabilitation. With respect to how defendants can meet their burden under the reasoning of the significant panel decision in *Patterson, supra,*, to prove a change in circumstances, the WCJ's Report is correct in noting that substantial medical evidence is required, as any decision of the WCAB must be supported by substantial evidence. (*Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc); Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) As explained in *Escobedo,* in order to be considered substantial medical evidence, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo, supra,* 70 Cal.Comp.Cases 604, 621.) We agree with the WCJ that evidence of a change in circumstances warranting discontinuation of treatment cannot be obtained from a Qualified Medical Evaluator (QME), because the QME Regulations do not allow QMEs to provide an opinion on any disputed medical treatment issue. (Cal. Code Regs., tit. 8, section 35.5(g)(2).

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/ CRAIG SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 7, 2025

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

VICTOR CRUZ
LAW OFFICES OF ARASH KHORSANDI
CW LAW

CWF/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

An Expedited Hearing was completed on 1/14/25 with submission of the case on 1/17/25. The judge issued his decision on 2/4/25 in favor of the Applicant on the issue of continuing treatment at the Center for Neuro Skills. (CNS)

Defendant then filed a timely and verified Petition for Reconsideration on 3/3/25 based on the following:

1) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
2) That the evidence does not justify the findings of fact.
3) That the findings of fact do not support the order, decision, or award.

II.

STATEMENT OF FACTS

Petitioner's Statement of Facts is sufficient. The key facts are that Defendant performed a timely utilization review denial for the treatment at issue. Instead of submitting a request for Independent Medical Review, Applicant filed for Expedited Hearing and contended jurisdiction continued with the judge as laid out by the Patterson line of cases. The judge determined treatment needed to continue after Defendant failed to meet its burden of proof under the Patterson line of cases to show a change in circumstances or condition.

In ***Patterson v The Oaks Farm***, 79 Cal.Comp.Cases 910, the Appeals Board held that an employer may not unilaterally cease to provide treatment authorized as reasonably required to cure or relieve the effects of industrial injury upon an employee without substantial medical evidence of a change in the employee's circumstances or condition.

The reasoning is that Defendant acknowledged the reasonableness and necessity of the treatment when it first authorized it, and applicant does not have the burden of proving 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. Some decisions refer to a "material" change in condition. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization and starting the process over again.

See also ***National Cement Co. v. Workers' Comp. Appeals Bd. (Rivota)*** *(2021) 86 Cal.Comp.Cases 595.*

III.

DISCUSSION

THE WCAB ACTED IN EXCESS OF ITS POWER WHEN IT ISSUED ITS FEBRUARY 4, 2025 FINDINGS & A WARD SINCE IT LACKED .JURISDICTION AS THERE IS NO DISPUTE DEFENDANT'S 10/25/24 UR DENIAL OF DR. PRASAD'S RFA 10/24/24 WAS TIMELY

Regarding the "Patterson line of cases" the judge wrote:

> *"Under the Patterson line of cases, the judge is supposed to consider treatment authorization as an implicit agreement that the treatment is reasonable and necessary to cure or relieve the effects of the employee's industrial injury. Once treatment has been authorized, if the treating physician requests a continuation of the treatment, the burden shifts to defendant to show by substantial medical evidence that continuation of the treatment is no longer reasonably required due to a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new request for authorization of the ongoing treatment. "*

Apparently, the judge is supposed to think of this situation as jurisdiction over the continuing previously authorized treatment, since case law would suggest that once treatment is authorized, subsequent RFA's and UR determinations are superfluous.

Defendant argues here that there is no jurisdiction over this treatment because of a timely UR Denial. However, this was considered in a recent case with very similar circumstances. In ***Frausto v. Domestic Linen Supply, 2024 Cal. Wrk. Comp. P.D. LEXIS 442***. Defendant made the same argument in Frausto that the current Defendant is making regarding jurisdiction due to a timely UR Denial. However, the argument was rejected and the judge was allowed to determine that treatment should continue. That case is important to consider as it was issued just a few months ago and involved the same medical facility, type of neurological injury, treating physician and Applicant's attorney.

THE WCAB ACTED IN EXCESS OF ITS POWER BY ALLOWING A CONTINUING ORDER OF TREATMENT THAT FAR EXCEEDS DR. PRASAD'S

OCTOBER 24, 2024 RFA 01? 5 DAYS PER WEEK, 4 HOURS A DAY, FOR 25 TREATMENT DAYS AT CNS WITHOUT AN IMR DETERMINATION

Petitioner argues if treatment is be awarded then the judge should have awarded only the treatment referenced in the 10/24/24 RFA, which is for 25 treatment days. The judge's actual Award was for "Further and ongoing medical treatment at the Centre for Neuro Skills."

However, in the Opinion on Decision, the judge wrote the following which was taken by Petitioner as ordering treatment that far exceeds Dr. Prasad's RFA of 10/24/24.

> *"Since Defendant did not meet its burden of proof under the Patterson line of cases, treatment at CNS N euro Skills should continue without the need for further RFA's, utilization review or IMR, and until it is shown treatment is no longer reasonably necessary."*

Perhaps these words were not necessary by the judge but were made with what he perceived was consistent with the Patterson line of cases would require. Otherwise, the judge has no recommendations as to how Defendant might limit treatment at CNS.

THE FINDING OF FACT DOES NOT SUPPORT THE WCAB'S FEBRUARY 4, 2025 AWARD AS DEFENDANTS HAVE MET ITS BURDEN OF PROOF THAT TREATMENT AT CNS IS NO LONGER REASONABLY NECESSARY AS THERE IS SUBSTANTIAL MEDICAL EVIDENCE THAT APPLICANT'S CONDITION AND CIRCUMSTANCES HAVE CHANGED WARRANTING DISCONTINUED TREATMENT AT CNS

The judge provided a lengthy and detailed discussion on the issue of substantial medical evidence at pages 3 to 5 of the Opinion on Decision. It stated the following:

> "The judge concludes Patterson does indeed apply here and Defendant has the burden of proof to provide substantial medical evidence.
>
> Defendant was ready for this possibility and argues they do have substantial medical evidence of a change in condition or circumstances. However, this evidence is the utilization review denial dated 10/25/24 by Dr. Avrom Gart.
>
> Dr. Gart is not the treating physician and has never personally examined the Applicant as far as the judge knows. This somewhat undercuts his credibility when he makes determinations based on perceived progress or improvement from treatment.

Dr. Gart's relatively brief discussion provides no medical-legal style explanation that shows he understands the Patterson case, how its burden of proof is met, and how he is required to show the treatment has resulted in a change in condition or circumstances.

Dr. Gart at pages 4-5 of his Physician Peer review dated 10/25/24 (Exhibit E) discusses *"significant progress"* but then goes on to mention numerous examples of ongoing deficits. His "recommendations" discussion stated:

"On 9/6/24, certification was issued for APPEAL: Post acute day treatment neurorehab, 4 hours a day, 5 days a week for 23 days treatment days post head injury. The patient had made significant progress in meeting criteria in the guidelines. There were ongoing deficits of headaches, dizziness, revision, balance, disruption, memory, and processing continue to affect his ability to manage his household tasks and medical management. Peer discussion had been performed it was noted that there were continued functional deficits secondary to the injury including vision, equilibrium, and depression. He has been in the treatment program at the Center for Neuroskills since January 2024. In the peer discussion, a discharge date was not given as the condition was chronic in nature. In reviewing the current documentation, it appears that the patient make (sic) further progress. Multiple goals have been met as of 10/14/24. Examination by the requesting provider on 10/23/24 did not reveal significant continued deficits. It should be pointed out that the ODG suggests that total treatment duration for day treatment generally ranges between 4 and 6 months. Following a prolonged course of the treatment exceeding 6 months, the patient should be able to now transition to an independent regimen without the need for continued supervised treatment. Therefore, my recommendation is to NONCERTIFY the request for Post acute day treatment neurorehab, 4 hours a day, 5 days a week for a total of 25 treatment days post head injury. "

Under the circumstances, the judge considers this discussion too conclusory for it to be considered substantial medical evidence. Moreover, the decision to deny the treatment seems to be based on the idea that normal treatment of this type is supposed to be 4 to 6 months. Since Applicant's treatment exceeded six months,

then *"the patient should be able to now transition to an independent regimen without the need for continued supervised treatment."*

It seems the UR decision is based more on what a typical patient should have accomplished versus what was actually being accomplished by Applicant at CNS.

The judge decided to admit Exhibits K and L into evidence, but they were not given much weight. These are two different Peer Physician Reviews from two additional physicians. They appear to rely on how Applicant seemed to be doing after his treatment at CNS was cut off as the basis to continue to deny that same treatment.

With regards to discussing treatment with Dr. Prasad, these peer reviews show little detail as to the "significant progress" that had happened and why was it considered medically reasonable to cut off treatment as a result of that progress.

The substantial medical evidence on this issue should likely be coming from the PTP Dr. Prasad. Yet his reporting all supports the idea of continued treatment at CNS.

His original treatment plan was described as follows:

> *Victor Ernesto Cruz should participate in a post-acute neurorehabilitation day treatment program at CNS for the continued medical management of cognitive, linguistic, physical, and emotional deficits related to his postconcussional syndrome, mild traumatic brain injury, and subsequent decline in functional abilities. This includes deficits in the areas of mobility, balance, ocular motility, vestibular function, instrumental AOL performance, initiation, attention, concentration, memory, problem-solving, expressive/receptive language, and emotional- psychological stability. Neuroplasticity occurs optimally in the setting of intensive, aggressive, repetitive treatment. CNS utilizes neuro-developmental sequence approaches in all areas to maximize improvement. These services cannot be easily duplicated in general rehabilitation settings.* (Exhibit 4)

Dr. Prasad's treatment goals were listed on page 4 of Exhibit 5. It was to improve memory, improve symptoms of depression and anxiety and improve visual perceptual skills and ocular motor skills.

Dr. Prasad's office submitted an appeal to the UR Denial. (Exhibit 9) With regards to the last few months of treatment, the appeal stated:

Centre for Neuro Skills® Conference Summary for the reporting period .July 24- October 14, 2024, indicated working memory and prospective memory were improving with intense therapy. Visual fatigue, decreased processing speed, and difficulty with complex memory and attention tasks remain an area of concern affecting Victor's ability to participate in any community reintegration or return-to-work tasks and prevent him from clearance to participate in an adaptive driving evaluation, causing him to remain dependent on others for assistance and keep him at a TTD status.

Continued treatment is recommended at Centre for Neuro Skills® to address safety concerns and to continue significant progress, as recommended by MTUS Guidelines. This delay in authorization will hinder his continued progress. MTUS Guidelines indicate that if a patient is making functional gains in an intense day treatment program, it is less likely that these gains would continue in an outpatient setting.

Per the denial letter, dated October 25, 2024, despite the report of ongoing deficits of headaches, dizziness, blurry vision, extreme light sensitivity, balance disruption, poor memory, and decreased processing that continue to affect Victor's ability to manage his household tasks and medical concerns, the medical reviewer, Dr. Avrom Gart, MD, recommended a transition to an independent regimen. However, Mr. Cruz has not yet been cleared to participate in an adaptive driving evaluation, and has not proven to be safe with independent tasks in the home or community due to his ongoing severe visual deficits and cognitive/memory deficits, as indicated above. Mr. Cruz has made significant progress, as stated in this review letter, and does meet the criteria by MTUS Guidelines for ongoing treatment. This ongoing day treatment program is crucial for safety and to assure that the physical, mental, cognitive and vestibular deficits continue to be addressed to promote his safety and independence at home, in the community, and in his vocational role. This recommendation is medically necessary and is supported by ODG Guidelines."

The judge felt there was lack of substantial medical evidence to support the discontinuation of treatment at CNS. Of course, the judge is not trained as a physician but is trained on identifying what is substantial medical evidence.

Defendant basically wants a second opinion from the WCAB on whether the medical evidence demonstrates a change of condition or circumstance sufficient to end the treatment at CNS. If the WCAB determines there is not substantial medical evidence, it would be appreciated if they could provide increased detail as to how Defendant can meet their burden of proof. Unfortunately, Panel QME opinions are prohibited on treatment disputes. Which seems to leave utilization review physicians and the prescribing physician as the key experts providing medical evidence.

IV.
CONCLUSION

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

MARCH 11, 2025

Jeffrey Ward
WORKERS' COMPENSATION JUDGE