WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALISA ONRUANG, *Applicant*

vs.

UCLA, legally uninsured, *Defendants*

Adjudication Number: ADJ10793479
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant sought removal of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 18, 2020. By the F&O, the WCJ found that he had jurisdiction to determine the need for transportation to facilitate applicant's ability to perform activities of daily living (ADLs). He further found that applicant is in need of transportation to facilitate her ability to perform ADLs.

Defendant contends that the WCJ did not have jurisdiction to address the necessity of transportation for applicant. Defendant also contends that there is insufficient evidence to support a need for transportation for applicant to facilitate her ability to perform ADLs.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of defendant's Petition for Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the F&O.

FACTUAL BACKGROUND

Applicant claims injury to the neck, upper extremities, mid-back, low back, eyes, face, headaches and psyche on October 26, 2016 while employed as a registered nurse by UCLA. Defendant has accepted the neck as compensable. (Minutes of Hearing (Expedited), December 10, 2020, p. 2.)

Richard Emmanuel, M.D. provided treatment to applicant as her primary treating physician (PTP). In his December 14, 2018 report, he reported as follows in relevant part:

> The patient presents to the clinic 19 months status post C4-5 artificial disc replacement with anterior cervical partial corpectomy at C5, C6, C7 and anterior cervical fusion and instrumentation at C5-6 and C6-7.
>
> Unfortunately she continues to experience persistent numbness and tingling in the bilateral forearms and hands as well as droopiness of the left eye and facial twitching and numbness.
>
> The patient does experience an altered gait and states that she feels unsteady and unbalanced. She also complains of hand tremors throughout the day.
>
> She remains unable to drive and relies on her father or a car service such as Uber to get around. She also requires assistance with a majority of her activities of daily living.
>
> (Defendant's Exhibit A, Report of Richard Emmanuel, M.D., December 14, 2018, p. 3.)

Dr. Emmanuel recommended her care be transferred to a pain management specialist. (*Id.* at p. 9.)

Applicant was evaluated by her vocational expert, Enrique Vega. In his August 19, 2019 report, Mr. Vega reported the following from applicant:

> She remarked, "I want to have a second surgery to get better. I need to get better—heal myself" and "I need to find a surgeon who can fix me." She also stated "The only thing I have is hope. I hope I am not done and can return to work, but as of now I can't even move my neck, can't drive, and can't go to the market to get my own food."
>
> (Applicant's Exhibit No. 7, Vocational rehabilitation report of Enrique Vega, August 19, 2019, p. 6.)

Jan Merman, M.D. conducted a neurological consultation of applicant. He noted the following in his September 20, 2019 report:

> In fact, she has daily constant neck pain and she wears a neck brace. When she takes the brace off, she has a head tilt to the right. The patient essentially cannot move her neck to either side. She cannot drive and cannot work. She did see Dr. Larry Khoo, neurosurgeon, who diagnosed her with cervical radiculopathy and "instability" of her neck. He recommended prolotherapy with stem cells or chiropractic treatment. The patient also complains of dizzy spells and gets faint.

> She is not taking her Topamax. She also recently has had right retinal detachment and some cataract. Her headaches usually occur if she turns her neck. She has it daily, lasting one to two hours. There is also neck pain in the anterior and posterior part of her neck, which is pretty much constant.
>
> (Applicant's Exhibit No. 6, Report of Jan Merman, M.D., September 20, 2019, p. 1.)

On December 21, 2019, defendant issued a utilization review (UR) decision wherein it recommended a "prospective request for Unknown transportation to include assistant between 12/11/2019 and 2/14/2020 be non certified." (Applicant's Exhibit No. 4, Utilization review, December 21, 2019, exh. p. 9.) The UR decision stated:

> With respect to the request for transportation, the MTUS is silent. The Official Disability Guidelines state that transportation should be agreed upon by the payer, provider, and patient, as there is limited scientific evidence to direct practice. Because this service is not within the scope of utilization review, this item must be non-certified. This outcome is purely procedural, and is not intended and should not be interpreted as a valid opinion regarding whether this service is or is not necessary, and is or is not compensable. These questions are outside the scope of utilization review and are properly left to the claims administrator. For these reasons, it is recommended that the request for transportation should be non-certified.
> …
> Regarding transportation, the MTUS did not address therefore alternate guidelines were referenced.
>
> Transportation (to and from appointments)
> Recommended for medically necessary transportation to appointments in the same community for patients with disabilities preventing them from self-transport. (CMS, 2011) Note: This reference applies to patients with disabilities preventing them from self-transport who are age 55 or older and need a nursing home level of care. Transportation in other cases should be agreed upon by the payer, provider and patient, as there is limited scientific evidence to direct practice.
> Official Disability Guidelines, Knee & Leg: Transportation. (2019)
>
> (*Id.* at exh. pp. 10-11.)

The request for authorization (RFA) prompting the UR decision is not part of the evidentiary record.

Applicant filed a request for independent medical review (IMR) of the December 21, 2019 UR decision. In its February 12, 2020 response, the Administrative Director (AD) stated in pertinent part:

> IMR is available only to resolve disputes regarding the medical necessity of a recommended treatment. The dispute must be resolved by the parties prior to the initiation of the IMR procedure as referenced in California Code of Regulations, title 8, section 9792.10.3(a) and (d). The request for Unknown transportation to include assistant is not a medical treatment to cure or relieve from the effects of an industrial injury and cannot be reviewed under the IMR standards of necessity. The request for IMR of the Unknown transportation to include assistant is denied as it is ineligible for review.
>
> (Applicant's Exhibit No. 5, IMR decision, February 12, 2020, p. 1.)

Lawrence Miller, M.D. provides treatment to applicant as a secondary treating physician. In his March 27, 2020 report, Dr. Miller reported:

> I have now been asked to comment by applicant counsel on the patient's need for transportation with an assistant as I have previously outlined this patient is permanently and irreversibly 100% disabled. She is unable to drive safely. She is unable to take a [*sic*] public transportation. She suffers with end stage pain disorder, psychiatric issues, neurocognitive decline and chronic pain. It is unreasonable to expect her to drive or to take public transportation alone. It is necessary for the patient to be provided with transportation with an assistant considering the extent of her injuries and overall demise.
>
> (Applicant's Exhibit No. 1, Report of Lawrence Miller, M.D., March 27, 2020, exh. p. 4.)

An RFA dated March 27, 2020 recommending "Assistant with Transportation" identified as "For all activities" was submitted with Dr. Miller's report. (*Id.* at exh. p. 3.) The record does not contain a UR decision or response from defendant to this RFA.

The matter proceeded to an expedited hearing on December 10, 2020. The issues at trial were identified as:

> 1. Need for second panel in psychiatry under California Code of Regulations section 31.7.
>
> 2. Need for transportation to attend to activities of daily living.
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> (Minutes of Hearing (Expedited), December 10, 2020, p. 2.)

The WCJ issued the resulting F&O wherein he found that he had jurisdiction to determine the need for transportation to facilitate applicant's ability to perform ADLs. He further found that applicant is in need of transportation to facilitate her ability to perform ADLs. Good cause for an

additional qualified medical evaluator (QME) panel in psychiatry was found and an order for this panel issued as part of the F&O.[1]

DISCUSSION

I.

Defendant sought removal of the F&O. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.)[2] Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue.

Jurisdiction is a threshold issue, including jurisdictional questions regarding whether the Appeals Board has the authority to address a dispute. (See e.g., *Allied Signal Aerospace v. Workers' Comp. Appeals Bd.* (*Wiggs*) (2019) 35 Cal.App.5th 1077, 1084-1085 [84 Cal.Comp.Cases 367] [the Court of Appeal held that the issue of whether the UR process or the Appeals Board has jurisdiction over a home health care dispute is a final order].) The F&O here included a finding of fact that the WCJ had jurisdiction to address applicant's claimed need for transportation to facilitate her ADLs. Therefore, the F&O is a final decision subject to reconsideration rather than removal.[3]

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[1] Defendant does not dispute the finding of fact or order regarding an additional panel in psychiatry and therefore, we will not address this issue herein.

[2] All further statutory references are to the Labor Code unless otherwise stated.

[3] It is acknowledged that the WCJ's finding regarding an additional QME panel in psychiatry is an interlocutory decision regarding discovery. However, as previously discussed, defendant is not challenging the finding of fact or order regarding the additional panel and consequently, is not seeking removal of that decision.

II.

Section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).) Employers are required to establish a UR process for treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.)

Section 4610(a) provides as follows:

> For purposes of this section, "utilization review" means utilization review or utilization management functions that prospectively, retrospectively, or concurrently review and approve, modify, or deny, *based in whole or in part on medical necessity* to cure and relieve, treatment recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600.
>
> (Lab. Code, § 4610(a), emphasis added.)

Section 4610.5(c) separately contains the following definitions in pertinent part:

> (1) "Disputed medical treatment" means medical treatment that has been modified or denied by a utilization review decision on the basis of medical necessity.
> . . .
> (3) "Utilization review decision" means a decision pursuant to Section 4610 to modify or deny, *based in whole or in part on medical necessity* to cure or relieve, a treatment recommendation or recommendation by a physician prior to, retrospectively, or concurrent with, the provision of medical treatment services pursuant to Section 4600…"
>
> (Lab. Code, § 4610.5(c)(1) and (3), emphasis added.)

Section 4604 states in full as follows:

> Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5.
>
> (Lab. Code, § 4604.)

In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that it has jurisdiction to determine whether a UR decision is timely. If the UR decision is timely, the Appeals Board has no jurisdiction to address disputes regarding the UR because "[a]ll other disputes regarding a UR decision must be resolved

by IMR." (*Id.* at p. 1299.) As noted in the *Dubon II* decision, section 4604 provides that "[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5*." (*Id.* at p. 1305, emphasis in original.) Sections 4610 and 4610.5 expressly define a UR decision addressing treatment "based in whole or in part on medical necessity." In *Dubon II*, the Appeals Board found that sections 4610.5 and 4610.6 "specifically provide that where there is a dispute regarding a UR decision on 'medical necessity,' the dispute shall be resolved only by IMR." (*Id.* at p. 1309.)

In this matter, defendant's UR physician expressly declined to address medical necessity of the request for transportation for applicant and stated that "this service is not within the scope of utilization review." The UR further noted: "This outcome is purely procedural, and is not intended and should not be interpreted as a valid opinion regarding whether this service is or is not necessary, and is or is not compensable." Accordingly, defendant effectively declined to conduct UR of the request for transportation. Under these circumstances, there is no UR decision regarding this recommendation.[4] This is further bolstered by the AD's determination that the UR "decision" was not subject to IMR. The AD rejected applicant's IMR of the request for transportation because it was deemed "ineligible for review."

The Legislature has implemented a process to address treatment requests through UR and IMR. However, since both UR and IMR have declined to address the recommendation for transportation for applicant, the Appeals Board has jurisdiction to determine whether defendant must provide this on an industrial basis. The Labor Code expressly vests the Appeals Board with the authority for "the enforcement against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee." (Lab. Code, § 5300(b); see also Lab. Code, §§ 5301, 3207 [section 3207 defines "compensation" as "every benefit or payment conferred by this division upon an injured employee"].) The Appeals Board retains the authority to determine medical treatment controversies not subject to IMR. (See Lab. Code, § 5304 [the "appeals board has jurisdiction over any controversy relating or arising out of Sections 4600 to 4605 inclusive"].) In the absence of the Appeals Board's authority to address

[4] There is thus no merit to defendant's contention that it was not obligated to conduct UR of the March 27, 2020 RFA per section 4610(k). (Lab. Code, § 4610(k).)

this dispute, it is not clear what other remedy applicant would have to adjudicate whether she is entitled to transportation.

Therefore, we agree with the WCJ that the Appeals Board has jurisdiction to determine the need for transportation to facilitate applicant's ability to perform ADLs.

III.

The California Supreme Court has held that expenses for transportation for medical treatment appointments are ancillary to medical treatment benefits under section 4600. (*Avalon Bay Foods v. Workers' Comp. Appeals Bd.* (*Moore*) (1998) 18 Cal.4th 1165, 1175 [63 Cal.Comp.Cases 902].) Established case law has also determined that "attendant" services, like housekeeping, may be compensable if they are medically necessary and reasonable. (See *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36 [49 Cal.Comp.Cases 454] [housekeeping services may be recoverable as medical treatment under section 4600 if they are medically necessary and reasonable].) This encompasses assistance with transportation for *non-medical* reasons if it is shown to be reasonable and necessary. (See e.g., *Ramirez v. Kuehne and Nagel, Inc.* (October 3, 2014, ADJ6893931) [2014 Cal. Wrk. Comp. P.D. LEXIS 537] [non-medical transportation is a form of medical treatment that cannot be unilaterally terminated by the employer]; *Belling v. United Parcel Service, Inc.* (December 21, 2015, ADJ944426) [2015 Cal. Wrk. Comp. P.D. LEXIS 738] [non-medical transportation considered reasonable and necessary of part of medical treatment].)[5] Therefore, although applicant may receive non-medical transportation as part of her benefits under section 4600, she must show entitlement to transportation as reasonable and necessary based on substantial medical evidence. (*Dubon II*, *supra*, 79 Cal.Comp.Cases at p. 1312; see also *Sandhagen*, *supra*, 44 Cal.4th at p. 242; Lab. Code, §§ 3202.5, 5705.)

Pursuant to section 4600(b), "medical treatment that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27." (Lab. Code, § 4600(b); see also Lab. Code, § 4610.5(c)(2) [defining "medically necessary" and "medical

[5] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

necessity" as treatment based on certain standards].) Section 5307.27 specifies that these guidelines are the medical treatment utilization schedule (MTUS). (Lab. Code, § 5307.27(a); see also Cal. Code Regs., tit. 8, § 9792.20 et seq.)

As acknowledged in defendant's December 21, 2019 UR, the MTUS does not address transportation and the Official Disability Guidelines defers determination of this issue to agreement amongst the parties. Whether non-medical transportation for applicant is medically reasonable and necessary must be evaluated based on the particular facts of this case. (See e.g., *Smyers*, *supra*, 157 Cal.App.3d at pp. 42-43 [question of whether housekeeping services are reimbursable is a factual question to be resolved in each case by lay and expert evidence].)

As far back as 2018, Dr. Emmanuel reported that applicant is unable to drive. Dr. Merman's September 20, 2019 report also noted that applicant could not drive. Dr. Miller confirmed in his March 27, 2020 report that it is unsafe for applicant to drive and she cannot take public transportation. Additionally, applicant told the vocational expert Mr. Vega that she cannot drive and is unable to go to the grocery store. The evidence shows that applicant has long reported an inability to drive due to the symptoms from her industrial injury and that her physicians have deemed her incapable of driving safely. Applicant has met her burden of showing that she requires transportation to facilitate her ability to perform ADLs and we consequently agree with the findings of the WCJ.[6]

In conclusion, we will affirm the F&O.

[6] The record includes a deposition transcript of the orthopedic qualified medical evaluator (QME), Steven Meier, M.D., wherein he opined that it would be reasonable for her to receive assistance with transportation. (Court's Exhibit Y, Deposition of Steven Meier, M.D., April 30, 2020, p. 13:3-12.) Dr. Meier as the QME is prohibited from commenting on any disputed medical treatment issue. (Cal. Code Regs., tit. 8, § 35.5(g)(2).) Consequently, his opinion was not considered in evaluating the record regarding the medical necessity of this recommendation.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders issued by the WCJ on December 18, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 14, 2021

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

ALISA ONRUANG
ANTHONY MASSINO
KROPACH & KROPACH

AI/*pc*

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