WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARK ERHARDT, *Applicant*

vs.

U.S. CONCRETE dba CENTRAL CONCRETE SUPPLY COMPANY, INC. permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11054418
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 27, 2022, wherein the WCJ found in pertinent part that defendant did not timely deny treating physician Maury K. Harwood, M.D.'s October 20, 2021 Request for Authorization (RFA) of a right knee MRI and left knee surgery; and that the surgery and MRI were reasonably necessary to cure or relieve from the effects of the industrial injury; WCJ ordered defendant to authorize the MRI and the surgery.

Defendant contends the trial record contains no evidence that the RFA was properly submitted to the claims examiner so "there was no triggering event of Utilization Review" and that there is no evidence that the right knee MRI and left knee surgery are reasonable and necessary medical treatment.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.[1]

[1] The Petition has four pages of exhibits attached and the Answer has twelve pages of exhibits attached. Both of the pleadings are in violation of Appeals Board Rule 10945(c). (Cal. Code Regs., tit. 8, § 10945.) The exhibits will not be considered and counsel are reminded that failure to comply with the Appeals Board Rules may be deemed sanctionable conduct.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and affirm the F&O except that we will amend the F&O to defer the issues of whether the requested surgery and MRI are medical treatment that is reasonably necessary to cure or relieve applicant from the effects of the industrial injury (Finding of Fact #2). Based thereon, we will amend the Order and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his left knee while employed by defendant as a concrete mixer driver on September 5, 2017. On September 25, 2019, Dr. Harwood was authorized to act as applicant's primary treating physician (PTP). (App. Exh. A2, correspondence, September 25, 2019.) On October 20, 2021, Dr. Harwood issued a progress report (PR-2) including an RFA requesting authorization for a left knee arthroscopy and a right knee MRI. (App. Exh. A4, Dr. Harwood, PR-2, October 20, 2021, p. 4.)

Melinda Brown, M.D., was authorized to act as applicant's "primary treating physician in the field of Pain Management" on April 23, 2021. (App. Exh. A3, correspondence, April 23, 2021.) In her November 1, 2021 PR-2, which indicates it was faxed to the claims examiner and defense counsel, Dr. Brown noted that applicant was "still waiting" on authorization for an arthroscopy by Dr. Harwood. (Def. Exh. D3, Dr. Brown, November 1, 2021, p. 3.) In the December 13, 2021 PR-2, (faxed to the claims examiner and defense counsel on December 14, 2021) Dr. Brown again stated that applicant was "still waiting" for authorization of the arthroscopy by Dr. Harwood. (Def. Exh. D2, Dr. Brown, December 14, 2021, p. 3.)

Applicant's attorney emailed Dr. Harwood's October 20, 2021, report and RFA to defense counsel on February 9, 2022.By the email Applicant's attorney requested Utilization Review of the October 20, 2021 RFA. (App. Exh. A5, Wilson & Wisler, February 9, 2022.)

The parties proceeded to trial on April 5, 2022. The issues submitted for decision were whether the RFA at issue "was stale upon receipt by Defendant," whether the left knee surgery requested by Dr. Harwood was "reasonable and necessary," and whether defendant's receipt of the RFA "started the Utilization Review time limitations." (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 5, 2022, p. 2.)

DISCUSSION

Administrative Director Rule 10109 states in part:

> (a) To comply with the time requirements of the Labor Code and the Administrative Director's regulations, a claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.
> (b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee. …
> (c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.
> (Cal. Code Regs., tit. 8, § 10109)

The Appeals Board has previously determined that:

> Although the strict utilization review timeframe begins upon the adjuster or UR organization's receipt of an RFA, where a dispute exists over whether an RFA was transmitted to the adjuster and defendant's attorney files an objection to the provision of medical treatment alleging that the claims administrator never received a copy of the RFA, and that same attorney then receives a copy of the disputed RFA, that attorney has a duty to transmit a copy of the RFA to the claims administrator within a reasonable time so that the dispute can be resolved as expeditiously as possible. ¶ … [D]efendant's attorney specifically objected to applicant's request for an expedited hearing on the basis that the claims administrator had not received a copy of the RFA in dispute. Defendant had knowledge that a treatment request was made, but defendant claimed that it did not receive the request. Defendant should have taken active steps to obtain the missing RFA and review the request for treatment. (Cal. Code Regs., tit. 8, § 10109.) Once defendant's attorney received the RFA from applicant, and because defendant's attorney had specific knowledge that his client required a copy of the RFA, defendant's attorney should have transmitted that RFA to the adjuster for review within a reasonable time period.
> (*Czech v. Bank of America* (2016) 81 Cal.Comp.Cases 856, 861 (panel decision).)[2]

Here, it appears there is no dispute that defendant's attorney received the October 20, 2021 RFA that was emailed by applicant's attorney. Based on review of the trial record, the panel's

[2] Although panel decisions of the Appeals Board are not binding precedent and have no *stare decisis* effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Appeals Board. (*Smith v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 530, 537, fn. 2 [65 Cal.Comp.Cases 277]; *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147]; (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en banc].)

analysis, as quoted above, is applicable to the circumstances in this matter, and we agree with the panel's conclusion that defendant's attorney should have transmitted that RFA to the claims adjuster for review within a reasonable time period. Further, there appears to be no dispute that the claims adjuster received the PR-2 reports from Dr. Brown, both of which specifically stated that applicant was "still" awaiting authorization for the arthroscopy to be performed by Dr. Harwood. (Def. Exhs. D1 and D2.) If the claims adjuster had not received the RFA from Dr. Harwood by the time Dr. Brown's reports were received, then those reports would have provided notice that "further investigation" was necessary. (Cal. Code Regs., tit. 8, § 10109(c).)

Thus, we agree with the WCJ that defendant did not timely submit the RFA for Utilization Review and in turn, did not timely deny the requested left knee surgery and right knee MRI.

As to the issue of whether the treatment requested by Dr. Harwood was reasonable and necessary, we first note that the employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.) Where a defendant's Utilization Review decision was untimely, the injured employee is entitled to 'reasonably required' medical treatment (Lab. Code, § 4600(a)) and it is the employee's burden to establish his or her entitlement to any particular treatment. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [69 Cal.Comp.Cases 1452]; *Dubon v. World Restoration, Inc*. (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*).) Although applicant's testimony about his medical condition was found to be credible (Report, p. 5), when deciding a medical issue, such as whether the proposed medical treatment is reasonable and necessary, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) To constitute substantial evidence, a physician's report must be well-reasoned, not speculative, it must be based on an adequate history and examination, and it must set forth the reasoning behind the physician's opinion. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Review of the trial record indicates the only medical report that addresses applicant's need for the left knee surgery and the right knee MRI, is the PR-2/RFA from Dr. Harwood. (App. Exh. A4.) The PR-2/RFA does not include a discussion or explanation as to why the requested treatment was reasonable and /or necessary. Thus the record does not contain medical evidence that explains why the MRI and/or the surgery are reasonable and necessary treatment for applicant's industrial

injury. Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (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].) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) "The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims." (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].)

When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) We therefore recommend, upon return of this matter to the WCJ, that the parties request Dr. Harwood submit a narrative report that explains his opinion as to why the treatment at issue is reasonable and necessary to relieve applicant from the effects of his industrial injury.

Accordingly, we grant reconsideration, and affirm the F&O except that we amend the F&O to defer the issues of whether the requested surgery and MRI are reasonably necessary to cure or relieve applicant from the effects of the industrial injury. We amend the Order and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on April 27, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 27, 2022 Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The issue of whether the requested left knee surgery and right knee MRI are reasonably necessary to cure or relieve from the effects of the industrial injury is deferred.

* * *

ORDER

The issue of whether defendant will be ORDERED to Authorize the Knee Surgery and MRI requested by Dr. Harwood in October of 2021, is deferred pending further development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2022

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

MARK ERHARDT
WILSON & WISLER
LLARENA, MURDOCK, LOPEZ & AZIZAD

TLH/*pc*

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