

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**DENISE ARMTROUT, *Applicant***

**vs.**

**PLEASANTON UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured,  
Adjusted by KEENAN ASSOCIATES, *Defendants***

**Adjudication Numbers: ADJ14895207; ADJ162421 (OAK 0342761);  
ADJ14895259; ADJ14894712  
Oakland 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, we will deny reconsideration.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 13, 2023**

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

**DENISE ARMTROUT  
LIRA LAW GROUP  
FLOYD SKEREN MANUKIAN LANGEVIN, LLP**

**AS/ara**

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

# REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

## I. INTRODUCTION

Applicant's Occupation:	Child Nutrition Specialist
Applicant's Age:	41
Date of Injury:	March 16, 2005 – March 16, 2006
Parts of Body Injured:	Legs
Identity of Petitioner:	Defendant
Timeliness:	Yes
Verification:	Yes
Date of Findings and Award	November 30, 2022
Defendants' Contentions:	Applicant is not entitled to a third independent medical review on the issue of lymphatic massage; the June 21, 2022 IMR determination should be upheld as it does not contain findings of fact that are plainly erroneous as a matter of ordinary knowledge; and the Administrative Director did not act without or in excess of its powers.

## II. STATEMENT OF THE CASE AND FACTS

Most of the relevant facts of this case were set forth in the December 2, 2021 Report and Recommendation on Petition for Reconsideration as follows:

*During the period ending on March 16, 2006, applicant sustained an injury arising out of and in the course of employment to her legs in the form of lymphedema while employed by defendant as a Child Nutrition Specialist.*

*On October 12, 2011, David Suchard, M.D., the agreed medical evaluator (AME) for applicant's lymphedema stated that applicant had "marked lymphedema of both lower extremities." (Exhibit 4, p. 9.) As relevant herein, he made the following medical treatment recommendations, "[d]iuretics and simple compression stockings are not typically helpful for lymphedema. Physical therapy with massage directed towards augmenting lymphatic drainage is typically utilized, often in an approach called complete decongestive therapy, with lymphatic drainage massage combined with multilayer compressive bandaging, and at times use of pneumatic compression pumps." (Id. at p. 11.)*

*On August 13, 2013, Dr. Suchard evaluated applicant and issued a report stating in relevant part that,*

*[Applicant] reports that she then had about 7 weeks of aggressive daily decompressive therapy for her lymphedema in a rehabilitation facility, and that this resulted in a loss of about 68 pounds of lymphatic fluid. During this aggressive lymphatic decompressive treatment, she developed some headache, probably due to fluid shifts.*

*In December of 2012, Ms. Armtrout reports that she was started on a 5-day-per-week regimen of lymphatic massage, pump and laser treatment. She had additional fluid loss, and her weight decreased to 267 pounds (from reported maximum of about 340 pounds).*

*Ms. Armtrout reports that further treatment for lymphedema was stopped and not further authorized after 4/24/13.*

*She has subsequently reaccumulated about 20 pounds of lymphatic fluid and reached her current weight of about 288 pounds. (Exhibit 5 at pp. 2-3.)*

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*On March 24, 2021, defendant's UR provider issued a report denying a March 21, 2021 request for authorization of lymphatic massage... (Exhibit 21 at p. 1.) ...*

*On April 9, 2021, applicant filed an IMR application in response to the UR non-certification of the lymphatic massage therapy.... (Exhibit 22.)*

*On June 3, 2021, Maximus non-certified the requests for lymphatic massage therapy. ...*

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*On October 12, 2021, the matter proceeded to trial on the issue of applicant's appeal of the Administrative Director's Independent Medical Review Determination dated June 21, 2021 ...*

*During the trial, applicant testified in relevant part as follows: In approximately 2011, she began treating her lymphedema, and in the last five years she has only received medical treatment for the lymphedema from Dr. Veiss and physical therapists. She currently uses a pump for three hours every day to treat her lymphedema. Her lymphedema requires her to wear compression garments during the day and special quilted garments during the night. She last had therapeutic drainage massage approximately three years ago. Since that time, she has gained thirty pounds in fluid weight. During that type of massage, the therapist opens her lymph nodes, pushes the fluid out of her joints, then wraps her in a bandage type material which she wears all night and which she believes caused neuropathy. The*

*following day, she is unwrapped and she will expel lymphatic fluid by urinating. She knows it is lymphatic fluid and not urine because it is much thicker. She believes lymphatic massage is helpful and Dr. Suchard she would need it for the rest of her life.*

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*On November 2, 2021, I issued a finding that the June 3, 2021 determination contained findings of fact that were plainly erroneous as a matter of ordinary knowledge and not subject to expert opinion, and I further ordered that the Administrative Director perform another review of the request for treatment. (Findings and Award, November 2, 2021, pp. 1-2.)*

On September 16, 2022, the Administrative Director issued a Final Determination Letter after re-review (Final Determination Letter After Re-Review<sup>1</sup>, September 16, 2022, p. 1). In relevant part, the Administrative Director summarized applicant's clinical case as follows,

Previous treatment has included home lymphedema treatment including a Flexi-touch pump (with continued swelling) and massage therapy (for an unclear total number of sessions with loss of fluid weight during consistent massage therapy), compression stockings, and medication therapy. Medications include Tylenol and Ibuprofen.  
(*Id.* at p. 3.)

The Administrative Director upheld the utilization review denial of treatment stating in relevant part that,

... Although lymph drainage therapy is not indicated for pain per the ODO, outside medical literature is cited for this review as the lymphatic massage therapy is requested for the diagnosis of lymphedema. According to one medical article cited above (Borman, P.), self-manual lymphatic drainage (MLD) is advised for the maintenance phase of complete decongestive therapy. Another article (Thomson, B., et al) identified conflicting findings and concluded that there is a 'need for further experimental studies on the effectiveness of MLD in lymphedema.' There is no documentation that the injured worker in this case was provided with education on self-manual lymphatic drainage and no rationale as to why the injured worker is unable to perform manual lymphatic drainage at home after completing lymphatic massage therapy performed by a provider. Furthermore, there is a paucity of evidence to support the effectiveness of manual lymphatic drainage for the treatment of lymphedema. Given this, the current request for lymphatic massage therapy 24 sessions is not medically necessary at this time.  
(*Id.* at pp. 4-5.)

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<sup>1</sup> This document is attached as an Exhibit to applicant's October 16, 2022 Appeal of Administrative Director's Final Determination Letter, and judicial notice was taken of that document.)

Applicant appealed that determination and filed a Declaration of Readiness to Proceed. Defendant objected to the Declaration of Readiness to Proceed arguing in relevant part that there was no statutory authority permitting applicant to obtain a third Independent Medical Review for the requested treatment. (Objection to Declaration of Readiness to Proceed, November 2, 2022.)

On November 14, 2022, the matter proceeded to hearing and the parties stipulated to submit the matters for disposition based on the current record without trial. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 14, 2022, p. 2)

On November 30, 2022, I issued Findings of Fact that the Administrative Director's September 16, 2022 determination contained Findings of Fact that were plainly erroneous as a matter of ordinary knowledge and not as a matter subject to expert opinion and again remanded the issue to the Administrative Director for Independent Medical Review.

On December 27, 2022, defendant filed its Petition for Reconsideration.

### **III.** **DISCUSSION**

At the outset, I note that defendant correctly states that the original non-certification of the lymphatic massage issued over a year and a half ago, and that therefore, the treating physician may issue another request for authorization of this treatment. However, applicant's right to renew the utilization review process does not obviate the issues in this matter.

As noted in my prior Opinions and Report and Recommendation, Labor Code section 4610.6(h) provides that,

.... The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:

- (1) The administrative director acted without or in excess of the administrative director's powers.
- (2) The determination of the administrative director was procured by fraud.
- (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
- (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
- (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion. (Lab. Code, §4610.6(h).)

Here, Maximus non-certified the request for lymphatic massage stating in relevant part that there was no evidence that applicant was provided with education on self-manual lymphatic drainage, that there was no rationale as to why she could not perform such treatments at home, and that there

was a paucity of evidence to support the effectiveness of the requested treatment. (Determination of the Administrative Director, September 16, 2022, p. 5.) That rationale is clearly inconsistent with the Administrative Director's statement that applicant's treatment consisted of home lymphedema treatment including massage. (*Id.* at p. 3.) Accordingly, the September 16, 2022 determination contained inconsistent statements and was based on a mistake of fact as a matter of ordinary knowledge and not a matter that is subject to expert opinion.

Next, as I previously explained in my most recent Opinion on Decision, there is no basis that would support a determination that an applicant would have no remedy if the Administrative Director issued two determinations that either contained a mistake of fact or were in excess of the director's authority. Additionally, the Labor Code does not prohibit multiple appeals of determinations by the Administrative Director. Further, the Appeals Board has issued persuasive panel decisions finding that an injured worker is entitled to a third independent medical review in exactly this type of situation. For example, in *McAtee v. Briggs & Pearson Constr.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 475<sup>2</sup>, the Appeals Board found that an IMR determination contained a plainly erroneous finding of fact and remanded the matter for a new IMR. Then, in *McAtee v. Briggs & Pearson Constr.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 375, the Appeals Board found that the second determination also contained a plainly erroneous finding of fact and remanded the matter for a third IMR. Therefore, because the Administrative Director's September 16, 2022 determination contained a mistake of fact as a matter of ordinary knowledge, applicant is entitled to a third independent medical review on the issue of her entitlement to lymphatic massage.

Based upon the above, I recommend denial of Defendant's Petition for Reconsideration.

Date: December 29, 2022

**Alison Howell**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup> Although panel decisions are not binding, they may be considered to the extent that their reasoning is reasoning persuasive (*Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc).)