WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALEJANDRA ALBARRAN, ***Applicant***

vs.

BEACH HAVEN INN; STATE FARM INSURANCE, ***Defendants***

Adjudication Numbers: ADJ6502989; ADJ6502933
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration and in the alternative removal of the July 26, 2023 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a housekeeper on March 11, 2008, sustained industrial injury to the back, neck, gastritis, diabetes, psyche and claims to have sustained injury to her bilateral upper extremities. The WCJ found that the defendant issued a timely Utilization Review (UR) denial of the treating physician's October 22, 2021 request for transportation to and from a medical appointment on October 29, 2021. The WCJ found that the treating physician's modified Request for Authorization (RFA) on November 23, 2021 did not request that defendant authorize medical transportation to and from all appointments with all doctors, and that neither the RFA nor the record as a whole supported the award of ongoing transportation.

Applicant contends that the October 29, 2021 decision letter issued by the defendant is not a Utilization Review determination; that the treating physician's report and RFA should be considered together in their entirety; that the Appeals Board has jurisdiction to decide the issue of transportation to medical appointments; that the evidence mandates a finding that applicant requires medical transportation to her appointments.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration/Petition for Removal (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and in the alternative Removal 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 discussed below, we will grant reconsideration and affirm the decision of July 26, 2023, except that we will amend the decision to reflect that defendant's October 27, 2021 denial of the physician's RFA was not a Utilization Review decision.

BACKGROUND

Applicant claimed injury to her back, neck, gastritis, diabetes, psyche and bilateral upper extremities while employed as a housekeeper by defendant Beach Haven Inn on March 11, 2008. Defendant admits injury to the back, neck, gastritis, diabetes, psyche, but disputes injury to the bilateral upper extremities.

On October 22, 2021, treating physician Jon McWhorter, Ph.D., issued an RFA seeking Expedited Review of a request for transportation to and from an appointment scheduled for October 29, 2021.

On October 27, 2023, claims administrator Sedgwick CMS issued a letter acknowledging that the "request for authorization was received on 10/22/21." (Ex. 7, Letter from Sedgwick CMS, October 27, 2021, p. 1.) The letter states, "there is a dispute regarding liability of your claim and we are unable to review your request for medical necessity at this time." The letter further states, "this treatment is disputed because [it is] not a medical procedure." (*Ibid.*)

On November 4, 2021, Dr. McWhorter issued a report entitled "Evaluation for Medical Transportation" addressed to applicant's counsel, noting that applicant had attended an October 22, 2021 evaluation, but that applicant had cancelled the follow-up appointment scheduled for November 5, 2021, pending resolution of transportation issues. (Ex. 3, Report of Jon McWhorter, Ph.D., November 4, 2021, p. 1.)

On November 23, 2021, Dr. McWhorter issued another RFA, indicating the request was a "resubmission - change in material facts." Therein, Dr. McWhorter again requested authorization

for transportation to the *prior* appointment on October 29, 2021. (Ex. 2, Request for Authorization, November 23, 2021, p. 1.)

The parties proceeded to trial on March 28, 2023, and framed the issue of "Transportation to medical appointment/appointments, specifically: Is the WCJ's jurisdiction limited to rule on the transportation requested via the RFA by Dr. McWhorter dated October 22, 2021, or, as applicant asserts, a blanket request for transportation." (Minutes of Hearing and Order, March 28, 2023, p. 2:18.) Additional trial proceedings were held on June 20, 2023, at which time applicant and witness Miguel Nose testified, and the parties submitted the matter for decision.

On July 26, 2023, the WCJ issued the F&O. Therein the WCJ determined that Dr. McWhorter had submitted an RFA on October 22, 2021, and that defendant had issued a timely UR denial on October 27, 2021. (Finding of Fact No. 5.) The WCJ found, in relevant part, that the November 23, 2021 RFA submitted by Dr. McWhorter does not request that defendant authorize medical transportation to and from appointments with all doctors, and that the narrative report from Dr. McWhorter standing alone, or in combination with the RFAs in evidence, substantiated the need for medical transportation to medical appointments with all doctors. (Finding of Fact No. 8.)

Applicant's Petition for Reconsideration and in the Alternative Removal (Petition) contends the October 27, 2023 document issued by Sedgwick CMS denying transportation to the appointment with Dr. McWhorter is not a valid UR decision, and that there is no timely UR decision. (Petition, at 6:23.) Applicant further contends the totality of the record mandates a finding that applicant required medical transportation to her appointments with Doctors Kasendorf and McWhorter. (*Id.* at 8:7.)

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case." (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 [260 Cal.Rptr. 76]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [163 Cal.Rptr. 750, 45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is

fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [97 Cal. Rptr. 2d 418, 65 Cal.Comp.Cases 650].) 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, 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 [210 Cal. Rptr. 3d 101, 81 Cal.Comp.Cases 1122].)

Here, the parties framed the issue of the Appeals Board's jurisdiction to adjudicate the issue of medical transportation. The July 26, 2023 F&O determined that applicant had not established medical necessity for treatment in the form of transportation to all medical appointments. (Finding of Fact No. 8; Order No. "a".) Because the WCJ exercised WCAB jurisdiction and determined an issue of medical treatment, as well as defendant's liability for that treatment, the decision was a final order. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

The issue presented herein involves the question of whether transportation to and from medical appointments is medically necessary. 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, 79 Cal. Rptr. 3d 171, 186 P.3d 535.)

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.
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> (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.
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> ...
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> (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..."
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> (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.) However, "where there is no timely UR decision subject to IMR, the issue of medical necessity must be determined by the WCAB." (*Id.* at p. 1312.)

Here, defendant's October 27, 2021 letter denying Dr. McWhorter's October 22, 2021 RFA *declines* to perform the requested utilization review on the grounds that the requested treatment "is not a medical procedure." (Ex. 7, Letter from Sedgwick CMS, October 27, 2021, p. 1.)

Accordingly, there is no timely UR decision that is otherwise subject to IMR, and the WCAB has jurisdiction to determine the medical necessity of the request. (*Dubon II, supra*, at p. 1312.)

Expenses for transportation to and from 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] (*Moore*).) In *Moore, supra*, the California Supreme Court explained that "the right to medical treatment transportation expenses under Labor Code section 4600 has been implied as dependent on and ancillary to medical treatment benefits, not as a different benefit … a necessary means to the end of ensuring prompt medical treatment so that an injured worker may return to the workplace." (*Moore, supra*, 18 Cal.4th at p. 1175.) Defendant's denial notice is thus inapposite, as the provision of transportation to and from medical appointments is an ancillary component to medical treatment benefits under section 4600. (See also *Onruang v. UCLA* (December 14, 2021, ADJ10793479) [2021 Cal. Wrk. Comp. P.D. LEXIS 348].)

The WCJ's Finding of Fact No. 5 states that on October 27, 2021, defendant issued a timely UR denial. However, to the extent that we find defendant declined to perform utilization review, and that their basis for declining to do so was in error, we will amend Finding of Fact No. 5 to reflect that defendant did not timely accomplish a utilization review of the October 22, 2021 RFA.

Turning to the issue of medical necessity, we note that as the party with the affirmative of the issue, applicant bears the burden of establishing that the requested transportation benefits are reasonable and necessary based on substantial evidence. (*Dubon II*, *supra*, 79 Cal.Comp.Cases at p. 1312; see also *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 242 [73 Cal.Comp.Cases 981]; Lab. Code, §§ 3202.5, 5705.)

However, as the WCJ explains in Finding of Fact No. 8, neither the October 22, 2021 nor November 23, 2021 RFAs request that defendant authorize medical transportation to all medical appointments on all appointment dates. Rather, the November 23, 2021 RFA reiterates the request lodged in the October 22, 2021 RFA for transportation to a single October 29, 2021 appointment with Dr. McWhorter. (Ex. 2, Request for Authorization, November 23, 2021; Ex. 7, Request for Authorization, October 22, 2021.) While applicant urges a broader reading of the RFA in tandem with the November 4, 2021 and April 23, 2023 letters of Dr. McWhorter, we agree that on the record before us, the requests were limited to a single date of service. (Opinion on Decision, p. 4.) Accordingly, we discern no basis to disturb the WCJ's determinations in this regard.

However, the Court of Appeal in *Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227, 234 [88 Cal. Rptr. 865, 35 Cal.Comp.Cases 383] has made clear:

> Upon notice or knowledge of a claimed industrial injury an employer has both the right and duty to investigate the facts in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he take the initiative in providing benefits. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the effects of the industrial injury....

Moreover, in *United States Cas. Co. v. Industrial Acc. Com.* (*Moynahan*) (1954) 122 Cal.App.2d 427, 435 [19 Cal.Comp.Cases 8], the Court said:

> Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury....[P] The duty imposed upon an employer who has notice of an injury to an employee is not...the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of his obligation and the needs of the employee."

We thus remind the parties that a prompt, good faith investigation and determination as to the need for medical treatment to cure or relieve from the effects of an industrial injury is required, and that the defendant's obligations in this regard do not allow for merely passive participation in the process.

In summary, we observe that defendant declined to perform Utilization Review, and as a result, we will grant reconsideration to amend Findings of Fact No. 5 to reflect this. We conclude that because the defendant declined to perform utilization review, jurisdiction over the dispute vests with the Appeals Board. However, we agree with the WCJ that both RFAs in evidence request medical transportation for a single appointment in 2021, and that a broader request is not substantiated in the current record.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of July 26, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of July 26, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

5. There is no timely Utilization Review decision regarding the October 22, 2021 RFA submitted by Dr. McWhorter.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 16, 2023

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

ALEJANDRA ALBARRAN
LAW OFFICES OF PHILIP M. COHEN
GOLDMAN MAGDALIN & KRIKES

SAR/abs

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