WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GERARDO ARAIZA, *Applicant*

vs.

SCOTCH PAINT CORPORATION; COMPWEST INSURANCE COMPANY; OAK RIVER INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY, *Defendants*

Adjudication Numbers: ADJ11143930; ADJ11143932
Van Nuys 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.

The employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.) Employers are further required to conduct utilization review (UR) of treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230.) Labor Code[1] section 4610.5 mandates Independent Medical Review (IMR) for "[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury." (Lab. Code, § 4610.5(a)(2); see also Lab. Code, § 4062(b) [an employee's objection to a UR decision to modify, delay or deny an RFA for a treatment recommendation must be resolved through IMR].)

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the Administrative Director (AD). The section explicitly provides that the AD's determination is

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

presumed to be correct and may only be set aside by clear and convincing evidence of one or more of the following: (1) the AD acted without or in excess of his or her powers, (2) the AD's determination was procured by fraud, (3) the independent medical reviewer had a material conflict of interest, (4) the determination was the result of bias based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (Lab. Code, § 4610.6(h).)

In upholding a challenge to the constitutionality of section 4610.6, the Court of Appeal held that IMR determinations are subject to meaningful review, even if the Appeals Board cannot change medical necessity determinations:

> The Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. (§ 4610.6, subd. (h)(1) & (5).) These grounds are considerable and include reviews of both factual and legal questions. If for example, an IMR determination were to deny certain medical treatment because that treatment was not suitable for a person weighing less than 140 pounds, but the information submitted for review showed the applicant weighed 180 pounds, the Board could set aside the determination as based on a plainly erroneous fact. Similarly, the denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually is permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and thus would be reviewable.
>
> (*Stevens v. Workers' Comp. Appeals Bd*. (2015) 241 Cal.App.4th 1074, 1100-1101 [194 Cal. Rptr. 3d 469, 80 Cal.Comp.Cases 1262].)

For the reasons stated by the WCJ in the Report, we are persuaded that the IMR determination was the result of a plainly erroneous finding of fact that is a matter of ordinary knowledge, and not a matter subject to expert opinion.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 25, 2023

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

GERARDO ARAIZA
GLAUBER BERENSON
MALMQUIST, FIELDS & CAMASTRA
GOLDMAN, MAGDALIN & KRIKES

PAG/abs

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

In case number ADJ11143930 the parties stipulated that Gerardo Araiza, age 54 on the date of injury, while employed during the period December 12, 2016 through December 12, 2017 as a store manager, at Gardena, California by Scotch Paint Corporation, sustained injury arising out of and in the course of employment to his cervical spine, thoracic spine, lumbar spine, bilateral upper extremities and bilateral knees, and that at the time of injury, the employer's Workers' Compensation carriers were CompWest, from December 12, 2016 through March 31, 2017, and Oak River Insurance Company for the period April 1, 2017 through December 12, 2017, and further, that the employer has furnished some medical treatment and applicant's primary treating physician is Dr. Rothi. They also stipulated that applicant is undergoing treatment for failed back surgery, bilateral knee pain, bilateral shoulder pain, thoracic spine pain, and bilateral hand pain. At the hearing on May 1, 2023, the sole issue raised was an appeal of an IMR determination with regard to the orthopedic injury claimed, which is under case No. ADJ11143930. Therefore, case No. ADJ11143932 was ordered taken off calendar.

In case No. ADJ11143930 a Findings of Fact issued on July 5, 2023 in which it was found that the September 7, 2022 independent medical review determination of the administrative director was the result of a plainly erroneous finding of fact, which erroneous finding is a matter of ordinary knowledge and not a matter subject to expert opinion as described in Labor Code § 4610.6 (h) (5). The independent medical review determination stated that Dr. Rothi's June 30, 2022 RFA was "for six months of continuous home healthcare without evaluating for compliance with the continued need for these services". However, Dr. Rothi's June 30 2022 RFA makes no mention of six months, and the accompanying PR-2 report clearly indicates a follow-up appointment was scheduled for August 10, 2022. Defendant filed a timely verified petition for reconsideration contending that the WCJ erred by: a) not finding that Dr. Rothi's June 30, 2022 RFA was for six months of continuous home healthcare.

II
FACTS

As indicated above, the parties stipulated that Gerardo Araiza sustained injury arising out of and in the course of employment to his cervical spine, thoracic spine, lumbar spine, bilateral upper extremities and bilateral knees, and that he is undergoing treatment for failed back surgery, bilateral knee pain, bilateral shoulder pain, thoracic spine pain, and bilateral hand pain. On June 29, 2022 Dr. Rothi issued a PR-2 report indicating "need home health services as recommended 2X/wk . . . 4hr/d 2days/wk". The report was accompanied by a handwritten prescription for these services and a Request for Authorization form dated June 30, 2022 requesting "HOME HEALTH ASSISTANCE 4 HOURS A DAY X 2 DAYS A WK PRN." (See applicant's Exhibit 21, PR-2 reports by Dr. Rothi up through September 20, 2022, pages 8 through 11). Please note this exhibit

is located in FileNet under case number ADJ11143932, with an EAMS document ID number of 76688038.

The matter proceeded to trial and a Findings of Fact issued on July 5, 2023 in which it was found that the September 7, 2022 independent medical review determination of the administrative director was the result of a plainly erroneous finding of fact, which erroneous finding is a matter of ordinary knowledge and not a matter subject to expert opinion as described in Labor Code § 4610.6(h)(5), in that it stated that Dr. Rothi's June 30, 2022 RFA was "for six months of continuous home healthcare without evaluating for compliance with the continued need for these services", when Dr. Rothi's June 30 2022 RFA makes no mention of six months, and the accompanying PR-2 report clearly indicates a follow-up appointment was scheduled for August 10, 2022. It is from this findings of fact that the defendant has filed a timely verified petition for reconsideration.

III

DISCUSSION

A

Dr. Rothi's June 30, 2022 RFA

Petitioner contends this WCJ erred in finding that the September 7, 2022 Independent Medical Review determination of the administrative director was the result of a plainly erroneous findings of fact, which erroneous finding is a matter of ordinary knowledge and not a matter subject to expert opinion as described in Labor Code §4610.6(h)(5) in that it stated that Dr. Rothi's June 30, 2022 RFA was "for six months of continuous home healthcare without evaluating for compliance and the continued need for these services", when Dr. Rothi's June 30, 2022 RFA makes no mention of six months, and the accompanying PR-2 report clearly indicates a follow-up appointment was scheduled for August 10, 2022.

Petitioner admits that Dr. Rothi's June 30, 2022 RFA requested home health assistance for "4 hours a day, for 2 days a week PRN". (See defendant's petition for reconsideration dated July 27, 2023, page 5, lines 4 - 5). Petitioner contends that the June 30, 2022 RFA had been revised despite the fact that "at the time of trial neither party had the revised RFA in their position, since neither party introduced it into evidence." (See defendant's petition for reconsideration dated July 27, 2023, page 5, lines 7 - 9). Petitioner's references to a "revised RFA" should be disregarded as no such document was offered into evidence in this matter.

The September 7, 2022 Independent Medical Review determination of the administrative director clearly asserts as its rational the statement that Dr. Rothi's June 30, 2022 RFA was for "home health aide assistance four hours a day, two days a week for six months for bathing, house mobility, and hygiene (failed back surgery, bilateral knee, bilateral shoulder pain) quantity in months #6". (Exhibit 16, IMR Determination, dated September 7, 2022, page 2). The rationale continued on page 3 indicating that "the request is for six months of continuous home healthcare without evaluating for compliance and the continued need for these services." This is factually incorrect. Dr. Rothi's June 30, 2022 RFA makes no mention of six months. It requests home health assistance for "4 hours a day, X 2 days a week PRN". Furthermore Dr. Rothi's accompanying PR-2 report clearly indicates a follow-up appointment scheduled for August 10, 2022. (See applicant's Exhibit 21, PR-2 reports by Dr. Rothi up through September 20, 2022, pages 8 through 11). On this basis it is clear that the determination of the administrative director was the result of a plainly

erroneous findings of fact, which erroneous finding is a matter of ordinary knowledge and not a matter subject to expert opinion.

IV
RECOMMENDATION

It is respectfully recommended the defendant's petition for reconsideration be dismissed as to case No. ADJ11143932, and denied as to case No. ADJ11143930.

DATE: July 31, 2023

Randal Hursh
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE