WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT ACEVEDO, *Applicant*

vs.

OLD DOMINION FREIGHT LINE, INC., and ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ12595156

Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 30, 2021, wherein the WCJ found in pertinent part that, "The testing requested by Dr. Nudleman, the second opinion consult in neurology, was to determine impairment ratings, future medical care, and work limitations. The requested testing does not constitute 'medical treatment' pursuant to Labor Code Section 4600." (F&O, p. 1.)

Defendant contends that issues regarding Utilization Review (UR) determinations and Independent Medical Review (IMR) determinations are not within the jurisdiction of the Workers' Compensation Appeals Board (Appeals Board), so the UR and IMR determinations could not be overruled by the WCJ.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&O.

BACKGROUND

Applicant claimed injury to his head, brain, lungs, and lower extremities while employed as a truck driver by defendant Old Dominion Freight Line, Inc., on September 26, 2019. Applicant's treating physician requested authorization for a 2nd Opinion Neurologist consult on February 18, 2020. MedInsights Utilization Review Services determined that the second opinion consult by neurologist Dr. Kenneth L. Nudleman, as requested by the treating physician, was "medically necessary" and the consultation was authorized. (App. Exh. 1, Authorization for Consult, February 24, 2020.)

In his October 14, 2020 report Dr. Nudleman stated:

> In order to assess his condition, I am recommending authorization for the following:
>
> Brain MRI. [Magnetic Resonance Imaging]
> EEG [electroencephalography] (95816).
> Digital QEEG [quantitative electroencephalography for memory loss] (95961).
> Cognitive P300 evoked response (92585) for attention and concentration.
>
> Upon completion, ... impairment ratings, any future medical care, and work limitations [will be determined].
> (App. Exh. 2, Kenneth L. Nudleman, M.D., October 14, 2020, p. 4.)

Defendant submitted the Request for Authorization to UR. The UR determination approved the MRI and denied approval of the other three diagnostics, stating that there was no "medical indication" for the requested diagnostics. (Def. Exh. A, MedInsights UR Determination, October 26, 2020, p. 2.) By its IMR Final Determination Letter Maximus Federal Services, Inc. upheld the UR determination stating that the diagnostics were "not medically necessary." (Def. Exh. B, IMR Final Determination Letter, Maximus Federal Services, Inc., December 24, 2020, pp. 2 – 4 [EAMS pp. 15 – 17].)

The parties proceeded to trial on February 3, 2021. The issues submitted for decision included defendant's assertion that "the WCAB lacks jurisdiction over UR and IMR issues." (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 3, 2021, p. 2.) Defendant sought reconsideration of the March 11, 2021 Findings of Fact. By our Opinion and Decision After Reconsideration we noted that although the UR authorization for the 2nd opinion consult by Dr. Nudleman had been identified as an exhibit it was not included in the record. We therefore

rescinded the Findings of Fact and returned the matter to the WCJ to create a complete evidentiary record.

At the November 15, 2021 Status Conference, the Authorization for Consult by Dr. Nudleman was entered into evidence as Applicant's Exhibit 1 and the matter was again submitted for decision. (MOH, November 15, 2021.)

DISCUSSION

We first note that:

> Any party that appears at a hearing or files a pleading, document or lien shall:
> (a) Set forth the party's full legal name on the record of proceedings, pleading, document or lien;
> (b) File a notice of representation if a party is represented and the attorney or non-attorney representative has not previously filed a notice of representation or an Application for Adjudication of Claim; and
> (c) Identify the insurer and/or employer as the party or parties .... The third party administrator shall be included on the official address record and case caption if identified as such.
> (Cal. Code Regs., tit. 8, § 10390, see also, § 10400; *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 289 (Appeals Board en banc).)

Having reviewed the entire record, it appears that virtually all of the pleadings submitted by the parties and the Minutes of Hearing indicate that the employer was insured by Gallagher Bassett Services, Inc., and the majority of the Minutes and pleadings state that Gallagher Bassett is administered by Ace American Insurance Company. Clearly, Gallagher Bassett is not an insurance company, and Ace American Insurance is not a third part administrator. The parties, and their respective counsel are required to accurately identify the parties in all of the pleadings and at each of the proceedings. Failure to do so could result in an unenforceable order or award identifying Gallagher Bassett Services, Inc. as the party liable for the benefits awarded. Also, failure to do so could be deemed sanctionable conduct. (Cal. Code Regs., tit. 8, § 10421.)

Regarding the merits of defendant's Petition, defendant is correct that the Appeals Board does not have jurisdiction over issues properly subject to UR and IMR determinations. (Lab. Code, § § 4610.5 and 4610.6.) However, Labor Code section 4610 states in part:

> (a) 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.)

Here, Dr. Nudleman identified his report as a "Complex Consultation - Consultative Report - Request For Authorization." (App. Exh. 2, p. 1; original in upper case.) The UR authorization states that:

> Based on the available medical information at the time of the review and MedInsights Utilization Management Guidelines, the 2nd opinion consult Neurologist (99205) Dr. Nudleman [sic] is medically necessary.
> (App. Exh. 1; underlining added.)

In his Opinion on Decision, the WCJ explained:

> [T]he diagnostic testing requested by Dr. Nudleman pursuant to his RFA was for EEG, Digital QEEG for memory loss (95961), Cognitive P300 evoked response (92585) for attention and concentration. ... This would go to nature and extent, and does not constitute "medical treatment" pursuant to Labor Code Section 4600. Furthermore, Dr. Nudleman was authorized by the utilization vendor as a 'consult' not a treating physician.
> (Opinion on Decision, November 23, 2021, p. 4; see also Report, pp. 4 – 5.)

Having reviewed Dr. Nudleman's report, it appears to be more analogous to a medical-legal evaluation report than a medical treatment report. Defendant makes various arguments based on its assertion that Dr. Nudleman is a "treating physician." There is no evidence in the record indicating that Dr. Nudleman was at any time designated to be a treating physician, and as noted by the WCJ, the diagnostics requested by Dr. Nudleman "do not represent medical treatment." (Opinion on Decision, November 23, 2021, p. 4; Report, p. 5.) We agree with the WCJ that Dr. Nudleman was not providing services reasonably necessary to cure or relieve applicant from the effects of his industrial injury, and in turn, he was not providing medical treatment. (Lab. Code, § 4600.) Thus, his request for authorization is not subject to UR or IMR determinations. The Appeals Board has jurisdiction over this matter, and we see no legal or factual basis for disturbing the WCJ's decision.

Accordingly, we affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 30, 2021 Findings of Fact and Order is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 29, 2024

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

ROBERT ACEVEDO
KWAN & ASSOCIATES
GLAUBER BERENSON & VEGO

TLH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND/OR REMOVAL

INTRODUCTION

Defendant filed a timely verified Petition for Reconsideration/Removal, dated December 9, 2021 in response to the Opinion on Decision and Findings of Fact, dated March 11, 2021. Mr. Acevedo sustained injury to his head, brain, lungs and lower extremities while employed on 9/26/2019, as a truck driver. This matter came to trial on the issue of authorization of treatment pursuant to an RFA issued on October 14, 2020 by Dr. Kenneth L. Nudleman, M.D.

PETITIONER'S CONTENTIONS

1. It was error for the Workers' Compensation Appeals Board judge to have made a determination in excess of the WCJ's jurisdiction and powers.

2. It was error for the Workers' Compensation Appeals Board judge to have overruled the determination of Utilization Review and of Independent Medical Review.

DISCUSSION

Pursuant to the Authorization for consult with Kenneth L. Nudleman, M.D., dated 2/24/2020, which stated "[B]ased on the available medical information at the time of the review and MedInsights Utilization management Guideline, the second, opinion consult Neurologist (S18205) Dr. Nedleman (sp) is medically necessary." (Exhibit 1)

Subsequently, Dr. Nudleman issued a consultative report on 10/14/2020 requesting the following:

RFA for EEG, Digital QEEG for memory loss (95961), Cognitive P300 evoked response (92585) for attention and concentration. In order to assess his condition, I am recommending authorization for the following:
Brain MRI. (Certified)
EEG (958 I 6).
Digital QEEG for memory loss (95961).
Cognitive P300 evoked response (92585) for attention and concentration.

Upon completion, *it will be determined impairment ratings, any future medical care, and work limitations.* (Ibid. p.6) (Emphasis added) (Exhibit 2)

Pursuant to CCR 9793:

(c) "Comprehensive medical-legal evaluation" means an evaluation of an employee which (A) results in the preparation of a narrative medical report prepared and attested to in accordance with Section 4628 of the Labor Code, any applicable procedures promulgated under Section 139.2 of the Labor Code, and the requirements of Section 10606 and (B) is either:

(1) performed by a Qualified Medical Evaluator pursuant to subdivision (h) of Section 139.2 of the Labor Code, or

(2) performed by a Qualified Medical Evaluator, Agreed Medical Evaluator, *or the primary treating physician for the purpose of proving or disproving a contested claim, and which meets the requirements of paragraphs (]) through (5), inclusive, of subdivision (h). (Emphasis added)*

An interesting question arises in whether diagnostic testing constitutes "medical treatment" or a valid "medical-legal" expense. If it's deemed medical treatment, then it is subject to UR/IMR. Two recent panel decisions illustrate the complexities of this issue. These cases involve the reimbursement of certain liens; however, the concepts are identical.

In *Hubbard v. United Parcel Service,* 2015 Cal. Wrk. Comp. P.D. LEXIS[,] [t]he WCAB reasoned that diagnostic testing may be considered a cost of medical treatment or a medical-legal expense, depending on the purpose served by the testing results. Under Labor Code § 4620, the lien claimant seeking reimbursement for the diagnostic testing as a medical-legal cost must establish that the contested claim existed at the time the expenses were incurred, that the expenses were incurred for the purpose of proving or disproving a contested claim and that the expenses were reasonable and necessary at the time they were incurred.

The majority of the WCAB panel concluded that, here, although the applicant's primary treating physician, Jens Dimmick, M.D., referred the applicant for neuropsychological testing, both Dr. Dimmick and the panel qualified medical evaluator, Paul Grodan, M.D., recommended

neuropsychological testing to address industrial causation, which was contested by the defendant, and not in order to plan for the applicant's ongoing medical treatment, thereby making the diagnostic services medical-legal expenses pursuant to Labor Code § 4620.

In *Ponce De Mauleon v. Harris Woolf California Almonds,* 2015 Cal. Wrk. Comp. P.D. LEXIS, the WCAB, reversing the WCJ, held that diagnostic electromyography (EMG) and nerve conduction study (NCS) requested by the applicant's primary treating physician, Jerome Robson, M.D., was medical treatment subject to utilization review and independent medical review under Labor Code §§ 4600 and 4610 [LC 4600, 461O] et seq., rather than a medical-legal cost subject to adjudication by the WCAB.

Here, the EMG/NCS diagnostic testing was requested by Dr. Robson as the primary treating physician to determine whether nerve damage was causing the applicant's complaints of back pain and radiculopathy. Dr. Robson requested the testing using the Primary Treating Physician's Progress Report PR-2 and Request for Authorization, which are utilized to request authorization for treatment by treating physicians. At the time the testing was requested, Dr. Robson was providing the applicant with ongoing treatment including examinations and prescriptions for various medications and had not reported the applicant permanent and stationary. *Dr. Robson did not indicate that the purpose of the EMG/NCS diagnostic testing was to generate a final medical-legal report. (Emphasis added)*

The WCAB concluded that the diagnostic testing requested by the treating physician in order to treat the injured employee is considered medical treatment, that the WCJ's analogy of Dr. Robson's services to medical-legal testing and reporting by an agreed medical examiner or qualified medical evaluator was inapplicable, and that the record in this case did not indicate the existence of a contested claim which is required for medical-legal expenses under Labor Code § 4620 [LC 4620) et seq.

These cases emphasize the difficulty that exists in distinguishing between what constitutes "medical treatment" and what constitutes a valid "medical-legal" expense. The crux of the problem is that much of medical treatment, by its very nature, is diagnostic. The very nature of medical treatment is often investigatory instead of palliative. It is not possible to cure, or for that matter, relieve, a condition without first identifying what the underlying problem is. Labor Code Section 4620(a) defines medical-legal costs as those costs necessary for the purpose of proving or disproving a "contested claim". Section 4620(c) fu1ther provides that medical evaluations, diagnostic tests and interpreters incidental to the preparation of a medical report do not constitute medical-legal costs unless the report is capable of proving or disproving a "disputed medical fact". *It is not difficult to argue that the nature and extent of the injured worker's injury is a "disputed medical fact" in every case.*

Here, the diagnostic testing requested by Dr. Nudleman pursuant to his RFA was for EEG, Digital QEEG for memory loss (95961), Cognitive P300 evoked response (92585) for attention and concentration. He stated in order to assess his condition, I am recommending authorization for the following:

Brain MRI.

EEG (95816).

Digital QEEG for memory loss (95961).

Cognitive P300 evoked response (92585) for attention and concentration.

Upon completion, *it will be determined impairment ratings, any future medical care, and work limitations.* (Ibid. p.6) (Emphasis added). This would go to nature and extent, and does not constitute "medical treatment" pursuant to Labor Code Section 4600. Since the finding of the undersigned is the above diagnostics do not represent medical treatment, a discussion regarding utilization review is unnecessary. (Emphasis added)

RECOMMENDATION

The undersigned WCJ respectfully recommends that applicant's Petition for Reconsideration/Removal, dated December 9, 2021 be denied.

Respectfully submitted,

DATED: December 20, 2021

/s/ Robert Sommer
ROBERT SOMMER
Workers' Compensation Administrative Law Judge