

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

ADOLFO EMILIO VELAZQUEZ, *Applicant*

vs.

Z GALLERIE LLC and ZENITH INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ10793741; ADJ10793758
Anaheim District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Cost Petitioner Anant Ram, M.D. (Dr. Ram), seeks reconsideration of the Joint Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on June 1, 2022, wherein the WCJ found that Zenith Insurance Company (defendant) complied with the requirements of Labor Code section 4603.3 and Administrative Director Rule 9794(f), and that Dr. Ram did not timely comply with the requirements of Labor Code section 4622; the WCJ ordered that Dr. Ram's Petition for Determination of Medical-Legal Expense Dispute was denied.

Dr. Ram contends that although the October 5, 2017 Explanation of Review (EOR) was timely it was not proper and therefore he is entitled to payment in the amount of \$2,375.00 plus sanctions.

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

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, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant, Adolfo Emilio Velazquez, claimed injury to his neck, upper extremities, back, and lower extremities while employed by defendant as a Distribution Center Associate on June 4, 2016 (ADJ10793741). Applicant also claimed injury to his neck, upper extremities, back, lower extremities, and nervous system while employed by defendant during the period from March 6, 2016, through March 6, 2017 (ADJ10793758).

On August 4, 2017, Dr. Ram evaluated applicant in the capacity of the orthopedic QME. (Cost Petitioner [CP] Exh. 2.) Defendant issued its EOR, stating:

This charge was disallowed as additional information/definition is required to clarify service(s). ¶ Denied, Zenith does not reimburse third party billers for services rendered by QME unless a valid [sic] assignment is on file pursuant to 8 CCR 9792.5.0. Please send a valid assignment signed by the QME or resubmit bill with the QME's name in box 31 and tin in box 25. To have payment mailed to a third party biller, include QME's name in box 33 with third party biller's address. Most record review performed [sic] on a separate attachment not signed by QME; report does not state that record review was performed by the physician. Based on LC 4628 report shall disclose the name of each person who performed any services in connection with the report. Also, record review time will be adjusted to 137 minutes; further justification is required to support the 4.5 hours spent on 137 pages.

(Def. Exh. A, Explanation of Review, October 5, 2017, original capitalized.)

The EOR also contained information regarding remedies available, including Second Bill Review and Independent Bill Review, and the applicable timelines for contesting the denial. (See Def. Exh. A, October 5, 2017, p. 2.)

Dr. Ram submitted a Request for a Second Bill Review on February 9, 2018¹ and on February 20, 2018, defendant issued its EOR stating:

Considered for re-evaluation. ¶ Second review not submitted timely (90 days) per sect 9792.5.5(b). Final review. No additional allowed.

(Def. Exh. A, Explanation of Review, February 20, 2018, original capitalized.)

The injury claims were resolved by Compromise and Release; the WCJ issued the Order Approving Compromise and Release on February 27, 2018.

¹ Although the EOR is not an exhibit in the trial record, in the Answer defendant states, "On 02/09/2018, 127 days after Zenith issued its EOR dated 10/05/2017, Dr. Ram submitted a Request for Second Bill Review (RSBR) received by Zenith on 02/12/2018 seeking payment of \$2,375.00." (Answer, p. 3; see also February 9, 2018 correspondence from Arrowhead Evaluation Services, CP Exh. 15.)

On April 26, 2018, Dr. Ram submitted a Request for a Second Bill Review that included a letter authorizing Arrowhead Evaluation Services (Arrowhead) to collect payment on his behalf. (CP Exhibit 4.) On May 8, 2018 defendant issued an EOR and a payment to Arrowhead in the amount of \$625.00. (Def. Exh. A, Explanation of Review, May 8, 2018.) Dr. Ram submitted a Request for a Second Bill Review on July 15, 2018, seeking additional payment in the amount of \$1,750.00. (CP Exh. 7.) By its July 26, 2018 EOR, defendant denied additional payment. (Def. Exh. A, Explanation of Review, July 26, 2018.)

On November 4, 2021 Dr. Ram filed a Petition for Determination of Medical-Legal Expense Dispute and Request for Penalty, Interest, Costs, Monetary Sanctions and Attorney's Fees.

Dr. Ram and defendant proceeded to trial on April 4, 2022. The issues submitted for decision included Dr. Ram's petition for costs and "Whether the WCAB has jurisdiction over IBR [Independent Bill Review] disputes." (Minutes of Hearing (MOH), April 4, 2022, p. 2.)

DISCUSSION

The following is a brief summary of the Labor Code and the California Code of Regulations relevant to the issues raised, and arguments made, in the Petition.

Labor Code section 4622 states in part:

All medical-legal expenses for which the employer is liable shall, upon receipt by the employer of all reports and documents required by the administrative director incident to the services, be paid to whom the funds and expenses are due, ... (b)(1) If the provider contests the amount paid, the provider may request a second review within 90 days of the service of the explanation of review. ... (2) If the provider does not request a second review within 90 days, the bill will be deemed satisfied and neither the employer nor the employee shall be liable for any further payment. (Lab. Code, § 4622.)

Pursuant to Administrative Director (AD) Rules 9792.5.4 and 9792.5.5:

This section is applicable to medical treatment services and goods rendered under Labor Code section 4600, or medical-legal expenses incurred under Labor Code section 4620, on or after January 1, 2013. ... (i) "Provider" means a provider of medical treatment services or goods, ... or a provider of medical-legal services whose billing processes are governed by Labor Code sections 4620 and 4622, that has requested a second bill review and, if applicable, independent bill review to resolve a dispute over the amount of payment for services according to either a fee schedule established by the Administrative Director or a contract for reimbursement rates under Labor Code section

5307.11. A provider may utilize the services of a billing agent, a person or entity that has contracted with the provider to process bills under this article for services or goods rendered by the provider, to request a second bill review or independent bill review.

(Cal. Code Regs., tit. 8, § 9792.5.4.)

(a) If the provider disputes the amount of payment made by the claims administrator on a bill for medical treatment services or goods rendered ... or bill for medical-legal expenses incurred on or after January 1, 2013, submitted pursuant to Labor Code section 4622, the provider may request the claims administrator to conduct a second review of the bill.

(b) The second review must be requested within 90 days of:

(1) The date of service of the explanation of review provided by a claims administrator in conjunction with the payment, adjustment, or denial of the initially submitted bill, if a proof of service accompanies the explanation of review.

(A) The date of receipt of the explanation of review by the provider is deemed the date of service, if a proof of service does not accompany the explanation of review and the claims administrator has documentation of receipt.

(B) If the explanation of review is sent by mail and if in the absence of a proof of service or documentation of receipt, the date of service is deemed to be five (5) calendar days after the date of the United States postmark stamped on the envelope in which the explanation of review was mailed.

(Cal. Code Regs., tit. 8, § 9792.5.5.)

Here, the underlying reason for the denial of the Petition for Determination of Medical-Legal Expense Dispute was that Dr. Ram “failed to comply with Labor Code section 4622 in a timely fashion” (See Joint Opinion on Decision, p. 3), i.e. did not request a second review within 90 days of the service of the explanation of review. (Lab. Code, § 4622(b)(1).) However, as quoted above, AD rule 9792.5.5 requires the request for a second review be made within 90 days of the date of service, if a proof of service “accompanies” the EOR. If there is no proof of service, the 90 days begins: on the date the claims administrator has documentation of receipt, “in the absence of a proof of service or documentation of receipt, the date of service is deemed to be five (5) calendar days after the date of the United States postmark stamped on the envelope” in which the EOR was mailed. (Cal. Code Regs., tit. 8, § 9792.5.5(b)(1).)

Having done a detailed review of the trial record, it is clear that none of the EORs include a proof of service. Nor is there any evidence that the adjuster submitted documentation of receipt or a postmark stamped envelope. Absent such evidence, there is no way to determine the beginning date of the 90 day period at issue in this matter.

It is well established that 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].) Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) (Appeals Board *en banc*) 66 Cal.Comp.Cases 473, 476.) In this matter, the threshold issue is whether Dr. Ram's Request for a Second Bill Review was timely. As stated above, the trial record, as it now stands, contains no evidence upon which a determination of that issue can be made. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Thus, under the circumstances discussed herein, it is appropriate that the matter be returned to the trial level for development of the record.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that Cost Petitioner Anant Ram, M.D.'s Petition for Reconsideration of the Joint Findings and Order issued by the WCJ on June 1, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 1, 2022 Findings and Award is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 18, 2022

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

**LAW OFFICES OF TAPPIN & ASSOCIATES
CHERNOW & LIEB**

TLH/pc

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