

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

LURA BROWN, *Applicant*

vs.

SCRIPPS HEALTH, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ2648619 (SDO 0337844)
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

In order to further study the factual and legal issues in this case, we¹ granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of October 31, 2019, wherein it was found that applicant's counsel was entitled to Labor Code section 5814.5 attorneys' fees in the amount of \$5,000.00 incurred in the enforcement of an award of medical treatment, which had been unreasonably delayed by defendant. In this matter, in a stipulated Award of November 12, 2009, it was found that, while employed on October 1, 2004 as a receptionist, applicant sustained industrial injury to her neck, mouth, leg, psyche and "unclassified,"² causing temporary disability from October 18, 2004 to July 31, 2005, permanent disability of 62%, and the need for further medical treatment.

Defendant contends that the WCJ erred in imposing Labor Code section 5814.5 attorney's fees, arguing that it did not unreasonably delay medical treatment. Alternatively, defendant argues that the amount awarded was excessive because it was not "proportional to the benefit garnered." We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will affirm the Findings and Award of October 31, 2019.

¹ The Order Granting Reconsideration was signed by Deputy Commissioner Anne Schmitz, who has become unavailable to participate in this matter. She has been replaced by Commissioner Marguerite Sweeney.

² The stipulated Award contains only the numeric Body Part Codes 200, 144, 842, 519 and 999 which correspond to the body parts listed above. We note that at the October 21, 2019 trial, the parties stipulated to injury to the neck, back, right shoulder, right arm, right wrist, and left knee.

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

1. Applicant's Occupation: Receptionist
Applicant's Age: 56
Dates of Injury: October 1, 2004
Parts of Body Alleged: Neck, back, right shoulder, right arm, right wrist, psyche and left knee
2. Identity of Petitioner: Defendant **SCRIPPS HEALTH**
3. Timeliness: **Petition was timely**
4. Verification: The Petition was verified.
5. Date of Issuance of Order: October 31, 2019

6. Petitioner's Contention(s):

- A. **That the Order/Award of attorney's fees was in excess of the Board's power and not supported by the evidence as the applicant attorney could no[t] show any benefit obtained by the efforts of the attorney**
- B. **That the agreement to set an appointment with Dr. Schleimer, a neurologist pursuant to an issue raised in the Declaration of Readiness to Proceed and was an unreasonably delayed or denied benefit**
- C. **The WCJ based her decision on legal arguments not raised by the applicant's attorney at the time the alleged fees were incurred.**
- D. **The award of attorneys' fees, if any are granted should be proportion to the benefits rendered by reason of the actions of the applicant's attorney.**

II

PROCEDURAL/FACTUAL HISTORY

A. Procedural History

The undersigned WCJ first awarded attorneys' fees of \$5,000.00 pursuant to the Petition filed by the applicant attorney following several expedited hearings on the treatment issue. The defendant filed for Reconsideration which was granted with orders to take evidence and testimony to support the award of

attorneys' fees. This resulted in a full day trial on October 21, 2019. A findings and Award granting applicant attorneys' request for attorneys' fees in the amount of \$5,000.00 was issued on October 31, 2019. During the course of listing the exhibits and discussing the issues the court became award that the UR decision was in 2012 and subject to the rules then in effect, i.e. medical disputes were resolved through the 4062/4062.2 process and that an AME had been utilized. The applicant attorney had repeatedly stated that there was an agreement to abide by the AME for the treatment issues, but the statement was misunderstood because the hearing[s] were being held in 2019. The defendants filed a Petition for Reconsideration on November 25, 2019 from Findings and Award dated October 31, 2019.

B. Factual History

The applicant sustained an admitted injury on October 1, 2004 while working as a receptionist for **SCRIPPS HEALTH**. She injured her neck, back, right shoulder, right arm, right wrist, psyche and left knee. The applicant settled via Stipulations with Request for Award on November 12, 2009. As part of the Stipulations and Award, there was a grant of future medical care for the admitted body parts.

On December 27, **2012** a dispute arose about the provision of medical care. Utilization review denied the treating physician's recommendations for all of the following except the MRI Neck (Applicant's Ex. 2, 12/27/2012 attachments):

- MRI Neck
- Office visit outpatient,
- Muscle test 2 limbs
- Motor Nerve Conduction Test
- Sensory Nerve Conduction Test
- Walker, folding wheeled
- Other Durable medical equipment such as grab bars and a toilet seat

Orthotic Management and training

Delivery and Set up of the durable medical equipment and Device handling

The applicant attorney objected to the Utilization denial on December 27, 2012, sent via fax and US Mail. [Note that in **2012** the disputes over UR were governed by Labor Code §4610(g)(3)(B), directing that the disputes were to resolved via Labor Code §4062/4062.2.] The applicant attorney complied with these requirements in his letter of December 27, **2012** by stating his objection to the UR determinations and naming Dr. Howard Tung as a potential Agreed Medical Evaluator (AME). (See Applicant's Exhibit 1.) The parties agreed to

use Dr. Tung and an appointment for March 13, 2013, jointly requesting that he address the treatment requests denied by Utilization review of December 27, 2012 (App. Ex. 3, pages 1 and 2). Dr. Tung issued a report on March 14, 2013 (App. Ex. 4) agreeing that the “grabber”, “shower chair”, “raised toilet seat”, “swallow consultation” and “psychiatric pain treatment” requested by the treating physician were medically reasonable and necessary. Following this report, the defendant wished clarification and Dr. Tung then issued supplemental reports of March 31, 2014 and October 27, 2014 (App. Ex. 6).

On June 26, 2018 the applicant attorney requested that the items found by Dr. Tung be provided. These included a pain psychiatrist near her home due to the difficulty in transportation (MOH:SOE 10:14-17). On December 14, 2018, the applicant attorney wrote again demanding that the requested medical treatment be provided (App. Ex. 9). Again, nothing happened. The applicant attorney filed a Declaration of Readiness to proceed on January 7, 2019 (EAMS ID 69035861). The items listed were “applicant's right to durable medical equipment” and “medical treatment as set forth in letters ... 6/26/18 and 12/14/2018”. Also listed pertinent to this discussion was “psychological treatment with[in] Applicant’s geographical area approved by defendant”.

The case was for hearing on January 29, 2019. The issues were discussed and the matter set over to March 18, 2019, a regular trial day to frame the issues (MOH 1/29/2019 EAMS ID 69798531). The case was continued to May 7, 2019. At that time the applicant attorney kept saying there was an agreement to resolve disputes with the AME. The WCJ did not understand what he was referring to and the defendant kept asking for a copy of any written agreement. The WCJ was unaware at that time that the dispute had been ongoing from a UR denial in December of 2012. Nonetheless, the parties agreed to reimburse applicant up to \$500.00 for durable medical equipment including a shower chair, raised commode, and/or grabber and/or walker. The defendants’ also authorized Dr. Schleimer (neurologist) to do the “swallow” test and other neurological complaints. The “swallow” test was determined to be reasonable and necessary in Dr. Tung’s report of March 13, 2013. The issue of attorneys’ fees was deferred pending the filing of a Petition and the case was taken off calendar (MOH 5/7/2019 EAMS ID 30686363). Finally, a trial was held on the issue of attorneys’ fees, an Award of \$5,000.00 issued once again on October 31, 2019 and defendants filed their Petition for Reconsideration (See procedural history, above).

III

DISCUSSION

CONTENTION A: THAT THE ORDER/AWARD OF ATTORNEY’S FEES WAS IN EXCESS OF THE BOARD’S POWER AND NOT SUPPORTED BY THE EVIDENCE AS THE APPLICANT ATTORNEY

COULD NOW SHOW ANY BENEFIT OBTAINED BY THE EFFORTS OF THE ATTORNEY

On December 27, 2012 a dispute arose about the provision of medical care. Utilization review denied the treating physician's recommendations for all of the following except the MRI Neck (Applicant's Ex. 2, 12/27/2012 attachments):

MRI Neck
Office visit outpatient,
Muscle test 2 limbs
Motor Nerve Conduction Test
Sensory Nerve Conduction Test
Walker, folding wheeled
Other Durable medical equipment such as grab bars and a toilet seat
Orthotic Management and training
Delivery and Set up of the durable medical equipment and Device handling

The applicant attorney objected to the Utilization denial on December 27, 2012, sent via fax and US Mail. [Note that in **2012** the disputes over UR were governed by Labor Code §461 O(g)(3)(B), directing that the disputes were to [be] resolved via Labor Code §4062/4062.2.] The applicant attorney complied with these requirements in his letter of December 27, **2012** by stating his objection to the UR determinations and naming Dr. Howard Tung as a potential Agreed Medical Evaluator (AME). See Applicant's Exhibit 1). The parties agreed to use Dr. Tung and an appointment for March 13, 2019, jointly requesting that he address the treatment requests denied by Utilization review of December 27, 2012 (App. Ex. 3, pages 1 and 2).

By its terms, Labor Code §4610.5 governs (a)(1) "Any dispute over a utilization review decision for an injury occurring on or after January 1, 2013" or (a)(2) "Any dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013." Labor Code §4610.5 is not applicable to this dispute as the date of injury was *prior* to January 1, 2013 *and* the UR decision was not communicated to the treating physician on or after July 1, 2013. (See Applicant's Ex. 1). Therefore the dispute that arose in December of 2012 was to be resolved pursuant to Labor Code §4062, then in effect.

Labor Code §4062 as it existed in 2012 and up to January 1, 2013 stated:

"(a) ... If the employee objects to a decision made pursuant to Labor Code §4610 to modify, delay or deny a treatment recommendation , the employee shall notify the employer in writing within 20 days of the receipt of that decision If the employee is represented by an

attorney, a medical evaluation to determine the disputed issue shall be obtained as provided in Section 4062.2 ...”

Labor Code 4062.2 “(b) If either party requests a medical evaluation pursuant to Labor Code §4062 either party may commence the selection process b7 [sic] for an agreed medical evaluator by making a request. ...”

The applicant attorney complied with these requirements in his letter of December 27, 2012 by stating his objection to the UR determinations and naming Dr. Howard Tung as a potential Agreed Medical Evaluator (AME). See Applicant’s Exhibit1). The applicant attorney agreed to a postponement of the Expedited Hearing pending the AME evaluation by Dr. Tung which was set for March 4, 2013. (See DOR Expedited Hearing EAMS ID 17073992 and MOH 1/24/2013 EAMS ID 46478008).

The parties sent a letter for Dr. Tung. The letter specifically requests that Dr. Tung as the AME address the treatment requests denied by Utilization Review on December 27, 2012 (See App. Ex. 3 pages 1 and 2).

On March 14, 2013, Dr. Tung issued his AME report (App. Ex. 4). On page 32 of 34 under future medical treatment Dr. Tung stated that Sedgwick informed him on March 4, 2013 that the EMG/nerve conduction study, walker with seat and a pain psychiatric evaluation were authorized. He further opined that the following items that were the subject of the UR denial were reasonable and necessary medical treatment:

- “Grabber”,
- Shower Chair
- Raised toilet seat
- Swallow Consultation
- Psychiatric pain treatment

Following the receipt of this report, the defendants told the applicant attorney that they needed “clarification” and they would agree to treatment once there was a clarification (MOH/SOE 15: 17-21). The parties requested the additional reports of which only the October 27, 2014 report is in evidence but it references opinions expressed in his March 31, 2014 report (App. Ex. 5).

On November 19, 2014, applicant’s attorney wrote to defendant and referenced the October 27, 2014 as a “third” supplemental report. The applicant attorney requested that items denied by UR including the durable medical equipment be provided as well as the swallow test and pain psychiatrist. (App. Ex. 6).

On June 26, 2018, the applicant attorney again wrote the defendant

requesting the items found by Dr. Tung as reasonable medical care be provided. The applicant had been seen by a psychiatrist but needed a referral to one near her home. The applicant had an old car that needed repair and it was difficult to drive to her appointments. (MOH:SOE 10: 14-17).

On December 14, 2018, the applicant attorney wrote demanding provision of medical treatment. (See App. Ex. 9).

On January 17, 2019 the treating pain management doctor, Dr. Kasendorf requested a home safety evaluation and need for adaptive equipment (App. Ex. 10, page 2, middle).

The applicant attorney filed a Declaration of Readiness to Proceed on January 6, 2019 (EAMS ID 69035861). The matter was set for Expedited Hearing on 1/29/2019 before Judge Utter who was unavailable. The matter was then heard, with consent of the parties by WCJ Atcherley who then continued the hearing for March 18, 2019 (MOH 1/29/2019 EAMS ID 69798531). On March 25, 2019, an Expedited Hearing on the issues raised in Dr. Raiszadeh's report of 2012 and the AME report of March 2013 along with the issue denial of medication. However, due to insufficient time, the Expedited was converted an MSC and continued over to May 7, 2019. However, the parties were able to a consult with a psychologist. Defendants also agreed to provide transportation to the initial consult with Dr. Sarah Ray. (MOH 3/25/2019 EAMS ID 69798531). The matter was continued to May 7, 2019 and set for trial.

At the hearing of May 7, 2019, (MOH 5/7/2019, EAMS ID 30686363) it was agreed that the defendant was to reimburse the applicant up to \$500.00 for the purchase of Durable Medical Equipment (MOH page 2, item 2). The defendant also authorized a consult with Dr. Schleimer for a neurological consult, including testing and referral for swallowing (MOH page 2, item 4). The psychological consult, the neurologist and swallowing issues as well as the durable medical equipment were all authorized by the AME in March 2013. The issue of attorneys' fees was deferred pending a Petition which was filed on May 16, 2019 (EAMS ID 70242713). It took 3 Expedited Hearings, seven years and a multitude of AME reports to get the defendants to provide the treatment recommended by Dr. Raiszadeh in 2012 and agreed to by the AME in March of 2013.

CONTENTION B: THAT THE AGREEMENT TO SET AN APPOINTMENT WITH DR. SCHLEIMER, A NEUROLOGIST PURSUANT TO AN ISSUE RAISED IN THE DECLARATION OF READINESS TO PROCEED AND WAS AN UNREASONABLY DELAYED OR DENIED BENEFIT

There is no merit to this contention. The need for a swallow test was raised

by Dr. Raiszadeh in 2012 and then confirmed by Dr. Tung's report on March 14, 2013 (App. Ex. 4) agreeing that the “grabber”, “shower chair”, “raised toilet seat”, “**swallow consultation**” and “psychiatric pain treatment” requested by the treating physician were medically reasonable and necessary. Following this report, the defendant wished clarification and Dr. Tung then issued supplemental reports of March 31, 2014 and October 27, 2014 (App. Ex. 6) without changing his opinion on any of the recommended items. Therefore, the agreement to use Dr. Schleimer was a direct result of the AME’s determinations of reasonable and necessary medical treatment, including the neurological tests and the swallow test which had been pending since 2012.

CONTENTION C: THE WCJ BASED HER DECISION ON LEGAL ARGUMENTS NOT RAISED BY THE APPLICANT’S ATTORNEY AT THE TIME THE ALLEGED FEES WERE INCURRED.

There is no merit to this Contention. As addressed in the Factual/Procedural History, above, and under Contention A, above, the applicant attorney kept referring to an “agreement” to resolve the medical disputes via an AME. The WCJ understood that to mean *all the disputes, including those post 7/1/2013*. This was factually and legally incorrect. The applicant attorney was referring only to those disputes which arose between December 27, 2012 and July 1, 2013, which were the subject of Dr. Tung’s AME reports (App. Ex. 4 and 6).

CONTENTION D. THE AWARD OF ATTORNEYS' FEES, IF ANY ARE GRANTED SHOULD BE PROPORTION TO THE BENEFITS RENDERED BY REASON OF THE ACTIONS OF THE APPLICANT'S ATTORNEY.

There is no merit to this contention. The applicant’s attorney tried to resolve the medical issues of “swallow test”, “durable medical equipment” and neurological testing since 2012. The applicant attorney spent considerable time go to the AME and then filing multiple letters with defendant demanding provision of the treatment and then filing for hearings on the treatment issues. There has been no contrary medical reporting to contradict the AME findings in 2013 and 2014 on the 2012 issues of medical treatment. These issues were finally resolved in May of 2019. The delay between December 27, 2012 and May 2019 was unreasonable based on the medical reporting and the law in effect at that time. Without the applicant attorneys’ efforts it is doubtful that they would be resolved by today. The Petition on file with the Court outlines the hours spent and effort to get the treatment authorized. See also MOH/SOE 10/21/2019 pages 7:1 through 21 :4 as to the efforts made by the applicant’s attorney.

In order to determine attorneys’ fees one has to consider the expertise of the attorney, the usual hourly rate, the effort expended and the results achieved.

Based on the above, and the pleadings and exhibits on file herein, it is abundantly clear that the applicant's attorney should be compensated for his efforts to enforce the award. Based on the time consumed in obtaining the medical treatment and the complexity of the issue, the award of \$5000.00 in attorneys' fees is reasonable and "proportional".

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of October 31, 2019 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 19, 2022

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

**LURA BROWN
MILBERG & DE PHILLIPS
ENGLAND PONTICELLO & ST. CLAIR**

DW/oo

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