WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSA HERNANDEZ, *Applicant*

vs.

FEDEX SUPPLY CHAIN DISTRIBUTION SYSTEM, INC.; ACE AMERICAN INSURANCE COMPANY, Administered by Sedgwick Claims Management Services, Inc., *Defendants*

Adjudication Number: ADJ16774509
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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ NATALIE PALUGYAI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 28, 2023

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

MEDLAND MEDICAL
BRUNDO LAW

PAG:acw

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 OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On September 29, 2023, the lien claimant, Medland Medical, Inc., filed a timely and verified petition for reconsideration dated September 28, 2023, alleging that the undersigned WCJ erred in his Partial Findings of Fact & Notice of Intention to Appoint Independent Bill Review Expert dated September 6, 2023. The lien claimant contends that its medical treatment was consistent with the medical treatment utilization schedule and the undersigned WCJ erred in disallowing it. In addition, the lien claimant contends it is unnecessary to obtain independent bill review to provide an opinion on the reimbursement of the medical-legal services rendered by the lien claimant. Finally, the lien claimant contends that it was entitled to penalties and interest despite those issues being deferred pending further development of the record.

STATEMENT OF FACTS:

The Applicant, while employed during the period March 11, 2021 to March 11, 2022, as a production worker, claimed to have sustained an industrial injury to her cervical spine, lumbar spine, both shoulders, both arms and both hands.

On January 21, 2023, WCJ Martha D. Henderson issued her order approving compromise and release for $15,000.00 resolving the case in chief.

On February 8, 2023, the lien claimant filed its lien for $3,448.48 for medical and medical-legal services rendered to the Applicant.

On September 5, 2023, the parties appeared before the undersigned WCJ for lien trial. Unable to resolve their dispute, the undersigned WCJ submitted the case for decision.

On September 29, 2023, the undersigned WCJ issued his partial finding that the Applicant sustained an industrial injury to her cervical spine, lumbar spine, both shoulders, both arms and both hands, that the medical treatment by the lien claimant was not reasonable but the medical-legal services were reasonable. With respect to reimbursement, on September 27, 2023, the undersigned WCJ, after issuing his notice of intention and in the absence of any timely objection, appointed Milt Kyle to provide an expert opinion on the reimbursement amount for the medical-legal services.

Aggrieved by the undersigned WCJ's decision, the lien claimant filed the present petition for reconsideration.

DISCUSSION:

REASONABLENESS OF THE MEDICAL TREATMENT

A defendant may defer utilization review for a medical treatment request "while the employer is disputing liability for injury or treatment of the condition for which treatment is recommended pursuant to Labor Code § 4062" [Labor Code § 4610(l)] and may conduct retrospective review within 30 days after its liability for that disputed medical dispute becomes final. [Labor Code § 4610(m); Cal. Code Regs., tit. 8, § 9792.9(b)-(c)] However, it must notify the provider within five business days from the receipt of the request for authorization [Cal. Code Regs., tit. 8, § 9792.9(b)(1)] and must raise the medical dispute under § 4062 within the time limits prescribed by the statute.

In this case, Dr. Haghighinia served his request for authorization dated July 5, 2023, [Lien Claimant's Exhibit "8"] for medical treatment on the Defendant. There was no evidence that the Defendant deferred the medical treatment request pending adjudication of compensability of the industrial injury. Accordingly, the Defendant waived its right to conduct retrospective utilization review at this time.

Notwithstanding the Defendant being denied the right to retrospectively review of the disputed medical treatment, pursuant to *Torres v. AJC Sandblasting* (2012) 77 Cal. Comp. Cases 1113 (Appeals Board en banc), lien claimants still hold the burden of proof to establish that their medical treatment is reasonable.

Labor Code § 4604.5 provides that the American College of Occupational and Environmental Medicine's Occupational Medicine Practice (ACOEM) Guidelines or any Medical Treatment Utilization Schedule (MTUS) adopted by the Administrative Director are presumed to be correct on the issue of reasonable of the medical treatment. The same section also states that this presumption may be controverted by scientific medical evidence establishing that a variance from the ACOEM Guidelines or MTUS is reasonably required. Therefore, in order to meet this burden of proof, a lien claimant is required to show that the disputed medical treatment was reasonably necessary to cure or relieve from the effects of the injury and that this treatment was consistent with ACOEM Guidelines or the MTUS. [*Frontline Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Lopez)* (2015) 80 Cal. Comp. Cases 380 (writ denied)] This requirement applies retroactively to all open cases, regardless of the date of injury or the date of medical treatment. [*Sierra Pacific Industries v. Workers' Comp. Appeals Bd. (Chatham)* (2006) 71 Cal. Comp. Cases 714.]

In this case, the lien claimant relied on the primary treating physician's comprehensive medical-legal report of Omid Haghighinia, D.C., dated December 5, 2022. In his report, on page 13, he recommended a course of chiropractic and physiotherapy to align the cervical and lumbar spine "for less segmental dysfunction, strengthen the musculature with exercises for more stability and decrease inflammation with use of modalities for better mobility and less pain." He cautioned that he rendered his recommendations without the benefit of reviewing the Applicant's entire medical records.

In his request for authorization dated July 5, 2023, Dr. Haghighinia formally requested authorization for physiotherapy and chiropractic treatment twice per week for four weeks.

With respect to the reasonableness of his medical treatment, on page 14, Dr. Haghighinia wrote as follows:

> "The ACOEM guidelines, ODG guidelines, and National guidelines point to the fact that the patient should have treatment provided as expediently and efficaciously as possible. As noted on page 113 of ACOEM guidelines, early intervention may increase successful return to work. It should be noted that ACOEM guidelines second edition discusses the importance of rapid and timely treatment on page 84 (statistics indicate that workers absent for more than six months due to a work-related complaint have approximately 50% probability of returning to work. Those absent more than one year have 25% probability and those absent more than two years have virtually no chance of returning to work). Treatment authorization without delay will provide cost saving to the system and return the patient to work as soon as possible."

However, Dr. Haghighinia failed to articulate how the medical treatment utilization schedule supported his specific request for physiotherapy and chiropractic treatment. Instead, he merely ascribes that various guidelines support "expedient[] and efficacious[]" and "rapid and timely" medical treatment. Unfortunately, this alone is insufficient to meet the lien claimant's burden of proof on the reasonableness of the medical treatment in accordance with Labor Code § 4604.5.

Therefore, the undersigned WCJ did not err in finding that the lien claimant's medical treatment was not reasonable.

APPOINTMENT OF INDEPENDENT BILL REVIEW EXPERT

A WCJ is empowered to direct the taking of additional evidence in order to resolve disputed issues requiring adjudication. [*Lundberg v. Workmen's Comp. Appeal Bd*. (1968) 33 Cal. Comp. Cases 656] This includes the right for a WCJ to appoint an independent bill review expert. [*Yanez v. Specter Off Road, Inc*. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 86 (Appeals Board noteworthy panel decision); *Garay v. Barrett Business Services, Inc.* (2012) 2012 Cal. Wrk. Comp.

Here, notwithstanding the lien claimant's insistence it involves a simple mathematical computation, in the absence of a stipulation by the parties on the value of the medical-legal services, the undersigned WCJ believes an expert opinion will help assist him in his duty to determine the amount properly owed to the lien claimant.

Therefore, the undersigned WCJ did not err in noticing his intention to appoint an independent bill review expert.

PENALTIES AND INTEREST

Given that the undersigned WCJ deferred any decision on the issue of penalties and interest on the monies owed to the lien claimant, it cannot be subject to a petition for reconsideration at this time.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the WCAB deny the lien claimant's petition for reconsideration dated September 28, 2023.

Dated: October 2, 2023

Respectfully submitted,

David L. Pollak
WORKERS' COMPENSATION
ADMINISTRA TIVE LAW JUDGE