

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

VANESSA BAILEY, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION;
legally uninsured, administered by
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ7325706; ADJ10214926
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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 21, 2023

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

**VANESSA BAILEY
SANJAY AGARWAL, M.D.
LAW OFFICES OF TAPPIN & ASSOCIATES
STATE COMPENSATION INSURANCE FUND, LEGAL**

AS/mc

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 October 27, 2023, the cost petitioner, Sanjay Agarwal, M.D., by his attorney of record, Tappin & Associates, Inc., filed a timely and verified petition for reconsideration dated October 27, 2023, alleging that the undersigned WCJ erred in his Findings of Fact & Order dated October 2, 2023. In his decision, the undersigned WCJ found that the cost petitioner failed to dispute the Defendant's bill review denials through Independent Bill Review (IMR), thereby deeming his bill satisfied by the Defendant. The cost petitioner contends that the Defendant's failure to address adequately the cost petitioner's request for augmented remuneration due to "extraordinary circumstances" rendered the need to appeal the dispute to IMR unnecessary and allowed for direct appeal to the WCAB to resolve the dispute.

STATEMENT OF FACTS:

The Applicant, while employed on November 22, 2009, as a lead groundskeeper, by the California Department of Corrections & Rehabilitation, sustained an industrial injury to her cervical spine. In addition, on August 27, 2015, she sustained an industrial injury to her cervical and lumbar spine.

On March 14, 2023, the cost petitioner filed his petition for determination of medical-legal expense dispute dated March 14, 2023.

On September 25, 2023, the parties appeared before the undersigned WCJ to adjudicate the cost petitioner's petition.

On October 2, 2023, the undersigned WCJ issued his Findings of Fact & Order, finding that the WCAB did not have jurisdiction to adjudicate the cost petitioner's petition due to his failure to submit the dispute to IMR.

Aggrieved by this decision, the cost petitioner filed his petition for reconsideration.

DISCUSSION:

Pursuant to Labor Code § 4622, “[a]ll medical-legal expenses for which the employer is liable shall . . . be paid . . . (a)(1) . . . within 60 days after receipt by the employer . . . [unless] the employer, within the 60-day period, contests the reasonableness and necessity for incurring the fees, services, and expenses using the explanation of review required by [Labor Code §] 4603.3.”

If the medical provider contests the explanation of review, it may request a second review within 90 days after the service of the explanation of review. [Labor Code § 4622(b)(1)] Within 14 days thereafter, “the employer shall respond with a final written determination on each of the items or amounts in dispute, including whether payment will be made.” [Labor Code § 4622(b)(3).]

If the medical provider still contests the amount paid, it “shall request an independent bill review as provided for in [Labor Code §] 4603.6.” [Labor Code

§ 4622(b)(4).] Independent bill review “shall only be conducted if the only dispute between the provider and the claims administrator is the amount of payment owed to the provider” [Cal Code Regs., tit. 8, § 9792.5.7(b)] and must be requested “within 30 calendar days of service of the second review . . . If the provider fails to request an independent bill review within 30 days, the bill shall be deemed satisfied, and neither the employer nor the employee shall be liable for any further payment.” [Labor Code § 4603.6(a).]

In this case, Sanjay Agarwal, M.D., issued a panel qualified medical evaluation report dated April 21, 2022, opining on the Applicant’s industrial injuries. [Cost Petitioner’s Exhibit “4”] On page five of his report, Dr. Agarwal wrote the following:

“Usually, this evaluation would fall under ML 201 for an initial psychiatric evaluation with the applicable 2.0 modifier, however, because of the complexity of the evaluation as described below, I believe [Labor Code §] 5307.6(b) applies. Accordingly, I have billed my usual and customary fee on an hourly basis to account for the total time required to prepare this evaluation.

There are clearly ‘extraordinary circumstances’ relating to the medical condition for which Ms. Bailey was evaluated. The best proof regarding the complexity of this evaluation is the substance of the medicolegal report which reflects these complex issues.”

Dr. Agarwal billed under CPT codes ML201 and 96130 and charged \$9,993.75 and \$174.33, respectively, totaling \$10,168.08. Dr. Agarwal served the report and bill on the Defendant on April 21, 2022.

On May 2, 2022, the Defendant processed the bill of Dr. Agarwal and reduced the amount of reimbursement to \$4,204.33 because the charge had exceeded the medical-legal fee schedule. [Cost Petitioner’s Exhibit “5”] In its explanation of review, the Defendant reduced the \$9,993.75 charge to \$4,030.00 and allowed the \$174.33 charge. In justifying its reduction, the Defendant concluded that “[t]he charge[s] exceed[ed] the Official Medical Fee Schedule allowance . . . [and] w[ere] adjusted to the scheduled allowance.”

On July 19, 2022, Dr. Agarwal served his request for second bill review on the Defendant along with his objection. [Cost Petitioner’s Exhibit “6”] Charlie Helton, the office manager for Dr. Agarwal, wrote that the Defendant improperly failed to account for the “extraordinary circumstances” pursuant to Labor Code

§ 5307.6(b) and merely reimbursed at the standard medical-legal billing code.

On July 25, 2022, the Defendant issued its second explanation of review upholding its prior explanation of review dated July 19, 2022. [Cost Petitioner’s Exhibit “7”] The Defendant wrote, “[t]his billing has been previously addressed and reimbursed per the Official Medical Fee Schedule. No further payment is due.”

Based on the facts set forth above, the Defendant met its statutory and regulatory time restrictions with respect to reviewing Dr. Agarwal’s bill.

Notwithstanding the Defendant’s timely explanations of review, in asserting that the WCAB, and not independent bill review, has jurisdiction over this case,

Dr. Agarwal first claims that, pursuant to Otis v. City of Los Angeles (1980) 45 Cal. Comp. Cases 1132 (Appeals Board en banc), a defendant is required “to make a specific and non-conclusory written objection to the reasonableness of any medical legal bill within 60 days of its receipt. If the defendant failed to do so, it was precluded from raising the reasonableness of the medical-legal cost.” [Camerena v. Stonehaven, Inc. (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 397, *12 (Appeals Board noteworthy panel decision)] However, in Otis, the WCAB, in construing what constituted a “specific and non-conclusory” objection, wrote the following:

“The legislature made it clear that the content of the contest or objection shall indicate the reasons[,] therefore. This requirement is a condition of a valid contest or objection and failure to set forth the reasons will have the same effect as though no objection had been filed. The reason(s) must be on a basis which, if established, would constitute a basis for reduction or denial of the bill. Thus, a contest or objection is not sufficient if it states in conclusory terms that the injury did not arise out of or occur in the course of employment, that the claim

is barred by the statute of limitations, that the applicant will not prevail in a Subsequent Injuries Fund claim, or that the bill is unreasonable.” [*Otis, supra*, 45 Cal.Comp. Cases at p. 1145 (internal quotations omitted).]

In reviewing the Defendant’s explanations of review, while not necessarily being a model of clarity, they did not rise to the level of not being “specific and non-conclusory.” Indeed, based on the objection of Mr. Helton dated July 19, 2022, he was aware that the Defendant did not accept Dr. Agarwal’s contention that he was entitled to reimbursement under Labor Code § 5307.6(b) as “extraordinary circumstances” and that the reduction was for that reason.

While it was unclear why the Defendant discounted the claim of “extraordinary circumstances,” this alone does not constitute a failure to meet the above standards that were set forth in *Otis*.

Dr. Agarwal next claims that the present dispute was not eligible for independent bill review because the dispute involved the factual determination of whether the medical-legal services rendered were “extraordinary circumstances.”

However, as set forth in Senquiz v. City of Fremont (2017) 83 Cal. Comp. Cases 782 (Appeals Board noteworthy panel decision):

“Using the correct procedure code is in fact the first step in determining the proper amount to be paid to a provider. Once the correct code is identified, the corresponding authorized payment amount can be identified.

In the present case, the only issue that must be resolved in order to determine the amount lien claimant is owed under the O[fficial] M[edical] F[ee] S[chedule] is whether the relevant bills used the correct procedure codes. If the WCAB had jurisdiction to resolve that question, the WCAB would effectively be determining the amount due under the fee schedule.” [*Id.*, at pp. 786-787]

In Tepfer v. San Diego Gas & Electric Company (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 101 (Appeals Board noteworthy panel decision), the WCAB held that it did not have jurisdiction to resolve the issue of the proper diagnosis related group code. The WCAB wrote that, “[a]lthough the amount of payment depends on the procedure code used, the only dispute is the amount of the payment” [*Id.*, at p. 5] and “[s]ince the amount of the payment in this case depended on the procedure code to be used, the only dispute was the amount of the payment due, thus subjecting the dispute to I[ndependent] B[ill] R[evue] only.” [*Id.*, at p. 6]

Furthermore, in Danhauser v. Howroyd Wright Employment Agency (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 30 (Appeals Board noteworthy panel decision), the cost petitioner failed to submit to independent bill review her dispute regarding the proper medical-legal billing code. In rejecting the cost petitioner's contention, the WCAB wrote that the issue of determination of the proper medical-legal billing code based on a factual determination of complexity was subject to independent bill review prior to an appeal to the WCAB.

In this case, similar to Senquiz, Tepfer and Danhauser, Dr. Agarwal wishes for, the undersigned WCJ to determine factually whether the medical-legal services rendered were extraordinary in accordance with Labor Code § 5307.6(b) given that he is dissatisfied with the Defendant's reduction of his billed services.

However, given that this determination would effectively determine the amount owed, a determination better done by independent bill review, Dr. Agarwal must submit his dispute through independent bill review first and, if dissatisfied with that decision, may appeal it to the WCAB to invoke its jurisdiction. His failure to do so deemed his bill satisfied by the Defendant.

Therefore, for the reasons that were set forth above, the present dispute was subject to independent bill review, depriving the WCAB of jurisdiction to adjudicate it.

The undersigned WCJ disagrees with the cost petitioner's contention, in his petition for reconsideration, characterizing the Defendant's explanation of review as "not valid and compliant" (8:20-21) pursuant to Otis because the Defendant applied the official medical fee schedule, applicable to medical treatment charges, when the medical-legal charges were subject to reimbursement pursuant to Cal. Code Regs., tit. 8, § 9795 (9:25-26 to 10:1-5) and the cost petitioner's claim of additional payment for "extraordinary circumstances" pursuant to Labor Code § 5307.6(b). (11:17-25) In addition, the undersigned WCJ disagrees with the cost petitioner's assertion that the WCAB is the only proper body to adjudicate whether the medical-legal report factually constitutes "extraordinary circumstances," and not a bill review expert. (23:19-25)

However, the Defendant did provide partial payment to the cost petitioner, although at a rate he is dissatisfied with for the reasons set forth above.

Despite the cost petitioner's contentions to the contrary, the Defendant apprised him adequately of the basis of his partial payment, for which he voiced his specific objection in a letter by Mr. Helton dated July 19, 2022.

Finally, despite exercising his right to request a second bill review, he failed to submit his dispute to IMR prior to submitting it to the WCAB. His invited error in failing to exhaust all of his procedural appeals cannot constitute a due process violation by the denial of his adjudicatory right to proceed directly to the WCAB.

Therefore, for the reasons that were set forth above, there is no reasonable basis to disturb the undersigned WCJ's decision.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the WCAB deny the cost petitioner's petition for reconsideration dated October 27, 2023.

Date: **October 30, 2023**

**DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE**