WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CANDACE PORTER, *Applicant*

vs.

KYOCERA DOCUMENT SOLUTIONS;
TRAVELERS PROPERTY AND CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Number: ADJ16301601
Santa Ana District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant Travelers Property and Casualty Company of America seeks removal of the August 21, 2023 Findings and Order on Appeal of Administrative Director's IMR Determination, wherein the workers' compensation administrative law judge (WCJ) found that the June 20, 2023 Independent Medical Review (IMR) determination was the result of a plainly erroneous findings of fact, which erroneous findings are a matter of ordinary knowledge, and not a matter subject to expert opinion. The WCJ rescinded the June 20, 2023 IMR determination and remanded the matter to the Administrative Director for another IMR by a different reviewer.

Defendant contends that the WCJ failed to consider Kambiz Hannani, M.D.'s, second Request for Authorization (RFA) for a home health and driving evaluation, which was also non-certified by a second Utilization Review (UR), making the instant IMR determination moot. Defendant further contends that the WCJ relied on the incorrect standard of proof, there was no clear and convincing evidence that the IMR did not review Dr. Hannani's deposition transcript, and the WCJ discussed non-certification of treatment outside of the scope of the petition appealing the Administrative Director's IMR determination.

We have not received an answer from applicant Candace Porter. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the Petition for Removal and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will treat this petition as

a petition for reconsideration. Based on the Report, which we adopt and incorporate, we deny reconsideration.

A party may petition for removal of an interim order. (Cal. Code Regs., tit. 8, § 10955.) Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez*, *supra*; *Kleemann*, *supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955.)

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either (1) "determines any substantive right or liability of those involved in the case . . ." (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]); or (2) determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656], emphasis added.) Interlocutory procedural or evidentiary decisions entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075; *Rymer*, *supra*, 211 Cal.App.3d at p. 1180; *Kramer*, *supra*, 82 Cal.App.3d at p. 45.)

Here, Labor Code[1], section 4610.5(e) provides in part, "A utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section." (§ 4610.5(e); *Dubon v. World Restoration* (2014) 79 Cal.Comp.Cases 1298 [2014 Cal. Wrk. Comp. LEXIS 131] (Appeals Board En Banc) ["There is no question that sections 4610 and 4610.5 provide that disputes over UR decisions shall be resolved by IMR."]) "The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties." (§4610.6(g).) An

[1] All statutory references are to the Labor Code unless otherwise indicated.

IMR determination may be appealed to the Appeals Board on enumerated grounds but not on the issue of medical necessity. (§ 4610.6(h).) Thus, an IMR determination is a final order on a threshold issue that directly affects applicant's benefits and is subject to reconsideration. We will, thus, treat defendant's petition as a petition for reconsideration.

We agree with the WCJ that applicant's appeal of the instant IMR determination is properly before us under section 4160.6(h), irrespective of the fact that there exists a second RFA with a second UR non-certifying the request that was not reviewed by IMR. This second RFA/UR does not divest the Appeals Board of jurisdiction under section 4160.6(h). There may be an issue of whether the second RFA/UR was proper given the existence of the instant RFA/UR/IMR; but that issue is not before us and we do not address it. (See § 4610(k).)

Accordingly, we deny defendant's petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant Travelers Property and Casualty Company of America's Petition for Reconsideration of the August 21, 2023 Findings and Order on Appeal of Administrative Director's IMR Determination is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 6, 2023

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

CANDACE PORTER
BENTLEY & MORE LLP
DIMACULANGAN & ASSOCIATES

LSM/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I.
INTRODUCTION

1.	Applicant's Occupation:	Copy Service Technician
	Applicant's Age:	47 (on date of injury)
	Date of Injury:	December 3, 2020
	Parts of Body Injured:	Lower back
2.	Identity of Petitioner::	Defendant filed the Petition.
	Timeliness::	The petition is timely.
	Verification::	The petition is verified.
3.	Date of IMR Decision:	June 23, 2023
4.	Petitioner's contention:	Defendant contends that:

a) Rescinding the IMR Determination and submitting the medical disputes to another IMR would result in Defendant incurring further litigation and medical costs on an issue arguably already moot, and through the court's decision in this matter the (WCJ) has caused substantial prejudice and irreparable harm to the Defendant.

II.
FACTS

Applicant sustained injury arising out of and in the course of employment to the lower back. Applicant claims to have sustained injury arising out of and in the course of employment to the psyche, sleep, stomach, head, and left wrist.

At the time of injury, the employer's workers' compensation carrier was Travelers. Disputes over treatment arose specifically related to an IMR Determination dated July 25, 2023 affirming decertification via Utilization Review of medical treatment subject to Request for Authority by Applicant's primary treating physician Kambiz Hannani M.D. Minutes of Hearing and Summary of Evidence, August 10, 2023 (hereinafter "MOE/SOE") p: 2; ll: 4-14.

The parties proceeded to trial on the issue of "Petition to Appeal IMR Determination, dated June 20, 2023." Id. ll: 16-17. Nothing in the parties' jointly executed Pre-Trial Conference Statement (hereinafter "PTCS") reflects trial issues to exclude MRI and C.T. scans. Id. and EAMS Doc ID: 77130662.

The parties proceeded to full evidentiary hearing including waiving of testimony, submission of documents and post-trial briefing.

The undersigned issued Findings and Order on Appeal of Administrative Director's IMR Determination on August 21, 2023. Defendant petitions for removal of the decision requesting that the WCAB remove this matter to itself for further review, proceedings, and/or decisions.

III.
DISCUSSION

THE WCJ DID NOT RELY UPOIN THE INCORRECT STANDARD OF PROOF

The undersigned initially recognizes Defendant highlights an inadvertent, but important scrivener's error in the decision at issue. Several references erroneously refer to "a preponderance of evidence." It is respectfully requested the Board correct that erroneous language to reflect the correct standard actually applied, which is evident in the onset of the opinion on decision at issue:

> *"Applicant has proven by clear and convincing evidence that the determination of the administrative director should be rescinded."*

See Findings and Order on Appeal of Administrative Director's IMR Determination, August 8, 2023 (hereinafter "F&O"), EAMS Doc ID: 77070965, p: 4.

The undersigned affirms "clear and convincing evidence" was the standard applied. The record will confirm there is clear and convincing evidence of plainly erroneous Findings of Fact, which erroneous findings are a matter of ordinary knowledge, and not a matter subject to expert opinion. Unfortunately, the undersigned committed the entirely inadvertent error of repeating the inapplicable legal standard "preponderance of evidence" throughout the remaining body of the decision and opinion at issue by "old habit."

Correction of this error by the Board is requested, perhaps with the understanding that "old (workers' compensation) habits die hard" though do not excuse them.

It is respectfully requested the Board correct the erroneous language reflecting the legal standard "preponderance of evidence" to reflect the correct standard actually applied, i.e. "clear and convincing evidence."

THE WCJ DID NOT FAIL TO CONSIDER SECOND RFA/UR DENIAL THAT RENDERED THE IMR DETERMINATION OF JUNE 20, 2023 AS MOOT

The undersigned reviewed the entire record finding clear and convincing evidence the IMR Determination of June 20, 2023 is based on plainly erroneous Findings of Fact, which are a matter of ordinary knowledge, and not a matter subject to expert opinion. The timing of issuance of Determination asserted by Defendant to render accuracy of the Determination moot is considered misplaced.

Simply stated, there is clear and convincing evidence of plainly erroneous Findings of Fact. They are in the IMR Determination of June 20, 2023. That is the issue raised in the Appeal heard at trial. That was confirmed to be the issue raised by and unresolved by parties in the Pre-Trial Conference Statement. PTCS, EAMS Doc. Id: 77130662

The mere existence of remediation by the primary treating physician of an evidentiary omission by a party (i.e., the provision of his deposition transcript to the IMR physician for review) does not reverse factual errors in the report. A decision otherwise simply preserves the factual errors it does not remedy them, the ostensible purpose of the appeal process in the undersigned's opinion.

The undersigned considered Defendant's argument(s) the June 20, 2023 IMR Determination is moot, and continues to dismiss it. Correcting plainly erroneous Findings of Fact appears necessary in this case, as is review by a different reviewer from the Administrative Director's independent review organization.

It is therefore respectfully requested removal be denied on this ground.

THE ISSUE OF CLEAR AND CONVINCING EVIDENCE THE REVIEWER DID REVIEW DR. HANNANI'S DEPOSITION TRANSCRIPT

Defendant appears to argue review alone of a document is sufficient to uphold an IMR Determination. It appears to the undersigned that defendant has "relied on (the) incorrect standard of proof" as it relates to the granting of an Applicant's appeal.

The undersigned understands the court's duty is to grant an IMR appeal when there is clear and convincing evidence the determination was the result of plainly erroneous express or implied Findings of Fact. Labor Code §4610.6(h)(5). The legal standard appears to be met when it is clear and convincing there are plainly erroneous express or implied Findings of Fact, not simply review

of documents tendered to the reviewer and reviewed. Granting the appeal thus appears required even if the deposition transcript at issue was reviewed.

Assuming arguendo the reviewer reviewed the deposition transcript of primary treating physician Kambiz Hannani M.D. there remain plainly erroneous express and/or implied findings of fact found and relied upon by the reviewer. This is the statutory basis upon which appeal is granted.

The clear and erroneous Findings of Fact and/or implied Findings of Fact are as follows:

> (1) The Determination reflects no clear indication of what activities the claimant can reasonably perform or the specific limitations the claimant needs home care to help with, even though primary treating physician Kambiz Hannani, M.D. testified on March 6, 2023 specifically about what activities the claimant can reasonably perform referencing "Activities of Daily Living" as well as pain associated with them. Exhibit 2 EAMS Doc ID: 47654412 pp: 8-9 ll: 6-23; 1-5.
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> (2) The Determination reflects the records do not allow a reasonable assessment of medical necessity, indicating the treating physician does not provide documentation of extenuating circumstances which would substantiate deviating from the Guidelines. Dr. Hannani testified on March 6, 2023 specifically identifying extenuating circumstances of both placement of hardware in Applicant's lumbar spine as well as removing the hardware requiring "an updated CT and an updated MRI." Id. p: 9; ll: 6-25; pp: 10-12; through l: 14.
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> (3) The Determination does not reflect the treating physician Dr. Hannani went on with his testimony to indicate it is "reasonable for somebody to go out to her house, a home health evaluator…and see her at home and determine what the needs of her would be, if any, for home health care in this case....(i)f she's having dystonic motion." Id. p. 18; ll: 19-25; p: 19; ll: 1-8. Dystonic motion is caused by involuntary muscle contractions. He assesses such motion as present based on the medical-legal reporting of Dr. Kenneth L. Nudelman, neurologist, dated February 22, 2023. Id. p: 16; ll: 20-25; pp: 17-18 ending at l: 18.

Submission alone of the deposition of Dr. Hannani to the IMR reviewer is not sufficient to uphold the IMR Determination. The Determination must be factually accurate. The evidence herein is clear and convincing it is not.

Dr. Hannani' s deposition and Dr. Nudelman' s referenced reporting is clearly convincing evidence the reported facts in the administrative director's June 20, 2023 independent medical review determination are plainly erroneous.

It is therefore respectfully requested removal be denied on this ground.

THE WCJ DID NOT DISCUSS NON-CERTIFICATION OF TREATMENT OUTSIDE THE SCOPE OF THE PRE-TRIAL CONFERENCE STATEMENT JOINTLY EXECUTED BY THE PARTIES AT TRIAL

The undersigned discharged his duties to address all issues raised by the parties in its joint pre-trial conference statement. PTCS E.AMS Doc. Id: 77130662. The Board will note Defendant's representations at page 9 of its petition including footnote 1 are not in the Pre-Trial Conference Statement or Minutes of Hearing as either stipulations or issues raised. EAMS Doc ID: 77130662; EAMS Doc ID: 77048528. The sole issue raised is as follows: 1. PETITION TO APPEAL IMR DETERMINATION 06/20/2023. PTCS (Id.) p: 3; MOH/SOE (Id.) p: 2; ll: 16-17.

Even if the undersigned over-stepped the bounds of the broad scope of trial issues, it appears Defendant concedes what appears to be no irreparable harm required for removal becasuse as it concedes "authorization of the MRI and CT scans." Labor Code § 5310; Title 8 California Code of Regulations §10955; Petition for Removal EAMS Doc ID: 48067687 p: 9; footnote 1.

It is therefore respectfully requested removal be denied on this ground.

DEFENDANT'S DELAY AND COST ARGUMENTS DO NOT REFLECT IRREPERABLE HARM

It is well established the price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy. *Huffman v. City of Poway* (2000) 84 Cal. App. 4th 975, 987 [101Cal.Rptr.2d 325]. The legislature has created a system of utilization review, independent medical review and appeal which specifically controls costs charged to employers' workers' compensation policies and limits treatment to only that reasonably required to cure or relieve from the effects of an industrial injury. Labor Code §§4600; 4610.6.

Defendant argues rescinding the IMR will result in "Defendant incurring further litigation and medical costs on an issue arguably already moot," causing substantial prejudice and irreparable harm to the Defendant. Petition for Removal EAMS Doc ID: 48067687 p: 13; ll: 5-9. The legislature appears to have specifically prohibited IMR Determinations to be based on clear and convincing evidence of plainly erroneous Findings of Fact in such "control of treatment and expense" related determinations. Of course the undersigned does not contemplate its decision to extend to that care already authorized, undisputed or otherwise not at issue.

The undersigned continues to find clear and convincing evidence of plainly erroneous Findings of Fact in the IMR Determination of June 20, 2023 as to that treatment not already

admitted compensable, authorized and provided but addressed therein. Defendant's bases for asserting irreparable harm appear to fail the legal standards required for removal.

It is therefore respectfully requested removal be denied on this ground.

FURTHER DEVELOPMENT OF THE RECORD IS NOT REQUIRED

Defendant argues "(i)f the (WCJ) was unable to reach a definitive conclusion to this question based on the current record, the (WCJ) could have simply ordered that the record be further developed to obtain clarification from the IMR itself. AD Rule 10575(g) provides that upon receiving notice of a Petition Appealing the AD's IMR Determination, the IMR unit may download the record of the IMR into EAMS, and the WCAB, in its discretion, may admit all or any part of the downloaded IMR record into evidence. (See also *Tyler v. WCAB* (1997) 62 CCC 924, 928, holding that 'Labor Code sections 5701 and 5906 authorize the WCJ and WCAB to obtain additional evidence, including medical, at any time during the proceedings.')." Petition for Removal EAMS Doc ID: 48067687 p: 8; ll: 18-28.

Defendant's argument ignores a definitive decision was reached in the Order issued. Defendant also recognizes the obvious permissive nature of downloading and/or admitting IMR records into the trial record. Defendant fails to recognize the only issue at trial raised is "1. PETITION TO APPEAL IMR DETERMINATION 06/20/2023."

When clear and convincing evidence is the IMR Determination issued 06/20/2023 contains plainly erroneous Findings of Fact it is correctly appealed, said appeal must be granted, and treatment issues addressed therein remaining in dispute remanded to the AD and submitted to the independent review organization for a review by a different reviewer. That is the result unequivocally ordered in the decision rendered herein.

The result in the F&O requires neither further development of the record, further downloads, review of documents or other evidence except review and determination by a different reviewer. Clear and convincing evidence reflects it requires review by a different reviewer to issue IMR Determination on plainly accurate and accurately expressed findings of fact, not erroneous or implied findings of fact.

It is therefore respectfully requested removal be denied on this ground.

IV.
RECOMMENDATION

The undersigned finds no irreparable harm to any party including Defendant by ensuring clearly convincing evidence of plainly erroneous or implied Findings of Fact in the IMR Determination dated 06/20/2023 are remedied. Labor Code § 5310; Title 8 California Code of Regulations §10955. The power to do so requires what was ordered in the decision at issue in this matter, i.e., the AD's June 20, 2023, independent medical review determination be remanded to the AD and submitted to the independent review organization for a review by a different reviewer.

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Removal be granted for the limited purpose of amending the F&O at issue to reflect the correct standard "clear and convincing evidence" as the bases for the Findings of Fact and Decision. It is further respectfully recommended Defendant's Petition for Removal be denied as to all other grounds asserted therein.

Date: September 8, 2023

DAVID H. PARKER
Workers' Compensation Judge