WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS RIVERA, *Applicant*

vs.

TAMARCO CONTRACTOR SPECIALTIES; CALIFORNIA INSURANCE GUARANTEE ASSOCIATON for CASTLEPOINT NATIONAL INSURANCE COMPANY, in liquidation, *Defendants*

Adjudication Numbers: ADJ7442612, ADJ7706839
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Lien claimant Nogales Psychological Counseling seeks reconsideration and removal of the July 27, 2023 Joint Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found in relevant part that there was no valid appointment of a treating physician; that there were no valid requests for authorization (RFAs) issued by any physician; that there was no compliance with Labor Code[1] section 4903.8 [*sic*]; that defendants were denied the right to control medical treatment; and that there was no referral by Dr. Black/Grand Chiropractic to lien claimant Nogales Psychological Counseling. The WCJ ordered in relevant part that lien claimant take nothing by way of its lien and dismissed the lien for failure to comply with section 4903.8 [*sic*].

Lien claimant contends that the issue of the primary treating doctor was not raised by defendant at trial and that the parties stipulated that Dr. Black was the primary treating physician; that defendant failed to authorize psychological treatment effectively denying care to applicant; that the decision of May 2022 found that applicant sustained injury in the form of psyche; that its request for authorization (Exhibit D-1) was proper; that it was properly appointed as a secondary treater; its reporting qualified as a medical-legal reporting and it was reasonable and necessary

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

pursuant to section 4620 and 4621; that its medical reporting is substantial evidence; that reimbursement should not be barred for lack of incorporation by the primary treating physician; that it complied with the declaration requirements.

The WCJ issued a Joint Report and Recommendation on Petition for Reconsideration and Removal (Report) recommending that the Petition for Removal be dismissed, and the Petition for Reconsideration be dismissed or denied. Defendant CIGA filed an Answer.

We have reviewed the allegations in the Petition for Reconsideration/Removal, the Answer, and the contents of the Report.

Based upon our preliminary review of the record, we will grant lien claimant's Petition for Reconsideration and we will order that this matter be referred to a WCJ at the Appeals Board for a status conference. Our order granting reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Based on our preliminary review, we have noted the following issues that appear to require further consideration.

First, with respect to the issue of the request for authorization, as relevant herein:

> The legislative scheme for reviewing employee treatment requests has changed over time. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 237 [79 Cal. Rptr. 3d 171, 186 P.3d 535, 73 Cal. Comp. Cases 981].) As discussed more extensively in *Sandhagen*, prior to SB 228, the employee's treating physician would make a treatment recommendation and, if a dispute arose, the parties would either obtain an AME or they would each separately obtain a qualified medical evaluator (QME). (*Sandhagen, supra*, 44 Cal. 4th at p. 238.) Thereafter, the issue of medical necessity would be determined by the WCAB based on the medical evidence presented.
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> In 2003, SB 228 was enacted. (Stats. 2003, ch. 639; *Sandhagen, supra*, 44 Cal.4th at pp. 239-241.) Among other things, SB 228 added section 4610. It requires that "[e]very employer shall establish a utilization review process in compliance with this section." (§ 4610(b).) Under this process, when a defendant disputes a treating physician's request for authorization of treatment (RFA), a UR physician must determine, based on "medical necessity," whether to approve, modify, or deny the requested treatment. (§ 4610(a), (c), (e), (g)(4).) In addition, section 4610 requires

that "[e]ach utilization review process shall be governed by written policies and procedures" and it mandates that certain procedural requirements "shall be met." (§ 4610(c), (g).)

In 2004, SB 899 was enacted. (Stats. 2004, ch. 34; *Sandhagen, supra*, 44 Cal. 4th at p. 241.) "While [SB] 899 did not alter the section 4610 utilization review process, it made a number of changes to the dispute resolution process in section 4062." (*Sandhagen, supra*, 44 Cal. 4th at p. 242.) Among other things, SB 899 amended section 4062 to allow an employee to object to a UR decision and obtain a comprehensive medical-legal report from an AME or a QME. (*Sandhagen, supra*, 44 Cal. 4th at pp. 242-245.)

Dubon v. World Restoration (2014) 79 Cal. Comp. Cases 1298, 1304-1305 (Appeals Board en banc).

In 2011, Rule 9792.6(o) defined a "request for authorization" as follows:

"Request for authorization" means a written confirmation of an oral request for a specific course of proposed medical treatment pursuant to Labor Code section 4610(h) or a written request for a specific course of proposed medical treatment. An oral request for authorization must be followed by a written confirmation of the request within seventy-two (72) hours. Both the written confirmation of an oral request and the written request must be set forth on the "Doctor's First Report of Occupational Injury or Illness," Form DLSR 5021, section 14006, *or on the Primary Treating Physician Progress Report, DWC Form PR-2,* as contained in section 9785.2, or in narrative form containing the same information required in the PR-2 form. If a narrative format is used, the document shall be clearly marked at the top that it is a request for authorization. (Italics added.)
(Cal. Code Regs., tit. 8, § 9792.6(o).)

According to our preliminary review of the record, on March 4, 2011, applicant's primary treating physician issued a progress report (PR-2). In relevant part, it states that: "Request pain management consultation; request psychological consultation." The PR-2 is signed by applicant's treating physician, Dr. Black. (Exhibit D-1, p. 1.) There is nothing in the record to indicate that defendant responded to this request for authorization.

Next, we note that in the F&O, the WCJ dismissed the lien for failure to comply with section 4903.8. Section 4903.8 refers to assignments. Based on our preliminary review of the record, the issue of assignments was not raised at trial, and there is no indication that lien claimant Nogales Psychological Counseling was involved in an assignment of its lien.

It appears that the WCJ may have been considering the application of section 4903.5. The legislature amended section 4903.05 in 2016 to add subsection (c), i.e., the declaration

requirement, which became effective January 1, 2017. In relevant part, subdivision (c)(2) states that: "Lien claimants shall have until July 1, 2017, to file a declaration pursuant to paragraph (1) for any lien claim filed before January 1, 2017, for expenses pursuant to subdivision (b) of Section 4903 that is subject to a filing fee under this section.

On October 30, 2012, lien claimant filed a Notice and Request for Allowance of Lien for its lien. According to our preliminary review, lien claimant timely complied with the declaration requirement on June 1, 2017, so that it appears that there was no basis to dismiss the lien for failure to comply with section 4903.05.

While we have discussed just a few of the issues that will require that the F&O be rescinded, we are concerned based on our preliminary review whether all of the legal issues have been properly identified; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision

must "set [] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Labor Code section 5310 states in relevant part that: "The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (See also Lab. Code, §§ 123.7, 5309.)

In order to expedite handling of this matter, we will order the matter to a status conference before a WCJ at the Appeals Board.

II.

We conclude by observing that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769] [the Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders,

decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "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]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650]) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant lien claimant's Petition for Reconsideration, order that this matter be set for a status conference, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the Joint Findings and Order issued on July 27, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge at the Appeals Board. Notice of the date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 17, 2023

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

NOGALES PSYCHOLOGICAL COUNSELING
R AND R SERVICES
MITCHELL & STORM
GUILFORD SARVAS & CARBONARA LLP

JMR/*ara*

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