

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

VENUS MARCIAL, *Applicant*

vs.

**NBCUNIVERSAL MEDIA, LLC;
ACE AMERICAN INSURANCE COMPANY,
administered by HELMSMAN MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ10772268, ADJ10772269
Marina Del Rey District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION,
GRANTING PETITION FOR REMOVAL,
AND DECISION AFTER REMOVAL**

We have considered the allegations of defendant's Petition for Reconsideration or Removal, applicant's answer 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 dismiss the petition to the extent it seeks reconsideration and grant it to the extent it seeks removal.

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 "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. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075 ["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”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ’s decision solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the petition will be dismissed to the extent it seeks reconsideration.

Nevertheless, for the reasons stated in the WCJ’s report, we will grant the petition to the extent it seeks removal, rescind the WCJ’s decision, and return this matter to the WCJ for further proceedings and decision.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of November 24, 2020 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 5, 2021

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

**BERKOWITZ & COHEN
FLOYD SKEREN MANUKIAN LANGEVIN
VENUS MARCIAL**

AI/pc

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 ON PETITION FOR
RECONSIDERATION, OR IN THE ALTERNATIVE,
PETITION FOR REMOVAL**

I

INTRODUCTION

1. Applicant's Occupation: Cook
- Dates of Injury: 12/14/2015 & 4/8/2014 – 11/3/2016
2. Identity of Petitioner: **Defendant** filed the Petition.
- Timeliness: The petition was timely filed.
- Verification: The petition was properly verified.
3. Date of issuance of Joint Findings of Fact: November 24, 2020
4. **Petitioner's contentions:**
- A. The Utilization Review Denial was timely
 - B. The Utilization Review was erroneously excluded from evidence.
 - C. The WCJ erred in finding that the Functional Restoration Program Evaluation requested by Dr. Jerrold Bustos was medically necessary.

II
FACTS

As stipulated by the parties, Applicant, while employed on December 14, 2015, as a Cook, at Universal City, California, by NBC Universal Media, LLC, sustained injury arising out of and in the course of employment to her bilateral hands/wrists, bilateral elbows and fingers. Applicant also claimed injured to her psyche and diabetes which were disputed by Defendant. (Case Number: ADJ10772269) Also, as stipulated by the parties, Applicant, while employed during the period of April 8, 2014 through November 3, 2016,) per PQME) as a Cook, at Universal City, California, by NBC Universal Media, LLC, sustained injury arising out of and in the course of employment to her bilateral hands/wrists, bilateral elbows and fingers.

In both cases numbers, the parties identified the issues as follows:

- 1. Parts of body injured: psyche and diabetes.
- 2. Additional Panel in internal medicine.
- 3. Untimely denial by UR on 7/17/2019 – reasonableness of treatment.

The parties jointly placed into evidence the medical reports of Panel Qualified Medical Examiner Dr. James Coleman dated April 24, 2020, December 4, 2018 and September 10, 2019.

Applicant placed into evidence, without objection, the treating doctor reports from Dr. David Auerbach, request for authorization report and medical reports from Dr. Jerrold Bustos, records from Kaiser and Healthline Medical, nurse's notes and correspondence from Applicant's Attorney and from claims. All exhibits offered by Applicant were entered into evidence without objection.

Defendant placed into evidence additional medical reports from Panel Qualified Medical Examiner Dr. James Coleman dated January 21, 2020, November 14, 2019, August 13, 2018 and January 11, 2018. Defendant also placed into evidence were multiple notices regarding denial of workers' compensation benefits. These exhibits were entered into evidence without objection.

Marked for identification only, on behalf of defendant was a UR denial to Dr. Jerrold Bustos.

No testimony was taken or requested.

A Joint Findings of Fact issued in these matters. In is from that decision that Defendant is aggrieved. No Answer has been received on behalf of Applicant.

III DISCUSSION

Defendants are aggrieved by determination that the UR denial letter to Dr. Jerrold Bustos was excluded from evidence. Also, Defendant are agreed by determination that the Utilization Review denial was untimely and excluded from evidence.

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures that defect.

There was no determination that the UR denial letter was untimely made by this judge. As it is noted in the Joint Opinion on Decision, this WCJ relied on the issues as framed which indicated "untimely denial by UR". This WCJ understood this language to mean that the parties agreed that the denial was untimely and what need to be determined was the reasonableness of the treatment requested by Dr. Jerrold Bustos. However, in light of the assertions in

the Defendant's petition, this WCJ re-reviewed the Pre-Trial Conference Statement in its entirety and based upon my vivid recollection of the extreme adversarial nature of the trial proceedings as well as the lack of any responsive pleading on behalf of Applicant, I do believe that whether the UR denial was timely was an issue for judicial determination which was not addressed in the Opinion or the Finding.

IV
RECOMMENDATION

It is respectfully recommended that the Defendants' Petition for Reconsideration be granted and the matter returned to this WCJ for a re-determination of the issues involving the Utilization Review and treatment requested by Dr. Jerrold Bustos.

DATED: 12/28/2020
JACQUELINE A. WALKER
Workers' Compensation Administrative Law Judge