WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE MARTINEZ GONZALEZ, *Applicant*

vs.

HOSPITALITY STAFFING SOLUTIONS; CHUBB INDEMNITY INSURANCE, administered by ESIS, *Defendants*

Adjudication Number: ADJ10946749
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

We have considered the allegations of defendant's 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons discussed below, we will affirm the Findings and Order.

Administrative director (AD) Rule 9792.9(b) permits deferral of utilization review (UR) if "the claims administrator disputes liability for either the occupational injury for which the treatment is recommended or the recommended treatment itself on grounds other than medical necessity." (Cal. Code Regs., tit. 8, § 9792.9(b); see also Lab. Code, § 4610(l)-(m).) We agree with the WCJ that if defendant wished to defer UR of the requests for authorization for treatment from the Dental Trauma Center in order to later conduct retrospective UR, it was obligated to send a written decision deferring UR as outlined in AD Rule 9792.9(b). It is emphasized that deferring UR would not necessarily preclude Dental Trauma Center's lien claim in this matter as there would remain issues regarding defendant's liability for self-procured medical treatment. (See *McCoy v. I.A.C.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93] ["the employer is required to provide treatment which is reasonably necessary to cure or relieve the employee's distress, and if he

[1] Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

neglects or refuses to do so, he must reimburse the employee for his expenses in obtaining such treatment"].)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on May 21, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 5, 2022

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

DENTAL TRAUMA CENTER
LAW OFFICE OF SAAM AHMADINIA
QUINTAIROS, PRIETO, WOOD & BOYER

AI/*pc*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendants Hospitality Staffing Solutions and ESIS for Chubb Indemnity Insurance have, through their representative, filed a timely, verified petition for reconsideration of the May 21, 2021 Findings and Order Re: Lien Claim of the Dental Trauma Center, which ordered that defendants pay lien claimant Dental Trauma Center the sum of $15,883.59, increased by 15%, plus 10% annual interest from defendants' date of receipt of lien claimant's bill as required by Labor Code section 4603.2(b)(1).

Defendants' petition contends that by the order and decision, the undersigned acted without or in excess of his powers as a workers' compensation judge on behalf of the Workers' Compensation Appeals Board, and that the evidence does not justify the findings of fact. Specifically, the petition contends that defendant was automatically entitled to conduct retrospective utilization review based on its denial of the claim, without any evidence that defendants reserved this right by issuing a written decision that complies with subsections (A) through (E) of Section 9792.9(b)(1) within five business days of receipt of the first Request for Authorization (RFA) from the Dental Trauma Center. Defendants also contend that although the reports of Mayer Schames, DDS were the only dental expert opinions in evidence, they do not support the order and decision because they are contradicted by statements in the reports of a chiropractic primary treating physician (PTP), a chiropractic panel qualified medical evaluator (PQME), and an orthopedic AME.

II

FACTS

A lien trial was conducted by telephone on March 11, 2021. At the lien trial, both defendant and lien claimant Dental Trauma Center offered exhibits that were admitted into evidence, and lien claimant called one witness, dental billing expert Beth Marie Gabler. The reports of orthopedic AME Lawrence Feiwell, M.D. were admitted into evidence as Court's X and Y. Although Dr. Feiwell found industrial injury to the lumbar spine and left shoulder, defendants disputed injury arising out of and in the course of employment, and stipulated only that applicant, Jose Martinez Gonzalez, while employed on March 1, 2017, at age 30, and during the period of November 12, 2016 through July 18, 2017, as a houseman, at Dana Point, California, by Hospitality Staffing, claimed to have sustained injury arising out of and in the course of employment to his head,

teeth, back, shoulder, and dental (Minutes of Hearing and Summary of Evidence, March 11, 2021, p. 2, lines 3-6).

Based on the AME reports of Dr. Feiwell in orthopedics, admitted into evidence as Court's X and Court's Y, it was found that applicant sustained injury arising out of and in the course of employment to his low back, and left shoulder. Based on Dr. Feiwell's statement that he would "have to defer to the appropriate specialist in the field of dentistry regarding whether applicant has a dental injury," (AME Report of Dr. Feiwell dated November 19, 2019, admitted as Court's Y, p. 2, line 5) and the reports of Mayer Schames, D.D.S., admitted as Lien Claimant's 7, 8, and 9, which are the only dental opinions in evidence, it was found that applicant also sustained secondary dental injury in the form of bruxism, xerostomia, and periodontal disease arising out of and in the course of employment. The opinion on decision accompanying this finding explained that Dr. Schames' reports constitute substantial medical evidence on the issue of causation of dental injury by reasonably linking bruxism to industrial pain symptoms, and linking periodontal disease from xerostomia to taking Advil for industrial pain symptoms as a matter of reasonable medical probability (Opinion on Decision, May 21, 2021, p. 3, lines 11-14). The opinion explained that inconsistent reporting of dental symptoms in the reports of non-dental physicians and chiropractors is insufficient to rebut the reasonable and probable indication of Dr. Schames that applicant had orthopedic pain, took Advil for it, and developed dental symptoms through the mechanisms explained by Dr. Schames (*Id*., p. 3, lines 14-17).

Based on the stipulations of the parties at trial, it was found that at the time of injury, the employer's workers' compensation carrier was Chubb Indemnity Insurance, administered by ESIS, that the employer has furnished some medical treatment, and the case-in-chief was resolved by compromise and release on January 16, 2020.

Based on California Code of Regulations, Title 8, Section 9792.9(b)(1), it was found that defendants are not entitled to retrospective utilization review, because there is no evidence that defendants reserved this right by issuing a written decision that complies with subsections (A) through (E) of Section 9792.9(b)(1) within five business days of receipt of the first Request for Authorization (RFA) from the Dental Trauma Center.

Based on the reports of Dr. Schames, admitted as Lien Claimant's 7, 8, and 9, which are the only medical expert opinions in the field of dentistry in evidence in this case, it was found that the treatment and evaluation provided by the Dental Trauma Center was medically necessary. The opinion on decision explained that Dr. Schames' reports not only correlate the items of treatment and testing with the need to treat, evaluate, and determine the cause of the disputed injury, but also provide, in Lien Claimant's 7, detailed information about the

need for, and efficacy of, each item of treatment and evaluation (Opinion on Decision, April 21, 2021, p. 4, lines 10-16).

Based on the *Kunz* study admitted as Lien Claimant's 10, showing full payment by other carriers and claims administrators for the full amounts charged for items billed in this case, including the full amounts charged for daytime and nighttime appliances for bruxism, and further based on the testimony of the only billing expert in evidence, Beth Gabler, it was found that there is no dental fee schedule, and that the reasonable value of services billed by the Dental Trauma Center in this case is $15,883.59, the amount indicated by Ms. Gabler in her unrebutted testimony (Minutes of Hearing and Summary of Evidence dated March 11, 2021, p. 7, lines 6-8). This is less than the full amount billed, and reflects Ms. Gabler's reasoned opinion as an expert in dental billing, with no contradictory evidence. A document of unidentified origin with what appear to be notes about Denti-Cal rates was identified as Defendant's J, but this document was not admitted into evidence because based on applicant's objection that it was not authenticated (*Id*., p. 4, lines 4-8). Based on Labor Code section 4603.2(b)(1), it was found that the reasonable value of services must be increased by 15%, plus 10% annual interest, because there is no evidence of a timely payment or explanation of review within 45 days of defendant's receipt of lien claimant's bill.

Accordingly, it was ordered that defendants Hospitality Staffing Solutions and Chubb Indemnity Insurance, administered by ESIS, pay to lien claimant the Dental Trauma Center the sum of $15,883.59, increased by 15%, plus 10% annual interest from defendant's date of receipt of lien claimant's bill as required by Labor Code section 4603.2(b)(1), and the lien claim was allowed in this amount.

The representative for defendants Hospitality Staffing Solutions and ESIS for Chubb Indemnity Insurance then filed a timely, verified petition for reconsideration of the Findings and Order Re: Lien Claim of the Dental Trauma Center. Defendants' petition contends that defendants were entitled to conduct retrospective utilization review based on its denial of the claim, and that the medical reports in evidence do not support the order and decision.

III

DISCUSSION

California Code of Regulations, Title 8, Section 9792.9(b) provides the following:

> (b) Utilization review of a request for authorization of medical treatment may be deferred if the claims administrator disputes liability for either the occupational injury for which the treatment is

recommended or the recommended treatment itself on grounds other than medical necessity.

(1) If the claims administrator disputes its liability for the requested medical treatment under this subdivision, it may, no later than five (5) business days from receipt of the request for authorization, issue a written determination deferring utilization review of the requested treatment, unless the requesting physician has been previously notified under this subdivision of a dispute over liability and an explanation for the deferral of utilization review for a specific course of treatment. The written decision must be sent to the requesting physician, the injured worker, and if the injured worker is represented by counsel, the injured worker's attorney. The written decision shall only contain the following information specific to the request:

(A) The date on which the request for authorization was first received.

(B) A description of the specific course of proposed medical treatment for which

(C) A clear, concise, and appropriate explanation of the reason for the claims

administrator's dispute of liability for either the injury, claimed body part or parts, or the recommended treatment.

(D) A plain language statement advising the injured employee that any dispute under this subdivision shall be resolved either by agreement of the parties or through the dispute resolution process of the Workers' Compensation Appeals Board.

(E) The following mandatory language advising the injured employee:

"You have a right to disagree with decisions affecting your claim. If you have questions about the information in this notice, please call me (insert claims adjuster's name in parentheses) at (insert telephone number). However, if you are represented by an attorney, please contact your attorney instead of me. and "For information about the workers' compensation claims process and your rights and obligations, go to www.dwc.ca.gov or contact an information and assistance (I&A) officer of the state Division of Workers' Compensation. For recorded information and a list of offices, call toll-free 1-800-736-7401."

Based on the requirements of this section, it was found that defendants are not entitled to retrospective utilization review, because there is no evidence that defendants reserved this right by issuing a written decision that complies with subsections (A) through (E) of Section 9792.9(b)(1) within five business days of receipt of the first Request for Authorization (RFA) from the Dental Trauma Center, dated April 20, 2018, which was admitted into evidence as Lien Claimant's 5. There is similarly no evidence of a written decision that complies

with subsections (A) through (E) of Section 9792.9(b)(1) in response to the RFA dated June 19, 2018, which was admitted into evidence as Lien Claimant's 6. The very specific requirements of Section 9792.9(b)(1) can only be construed as mandatory, despite the use of the permissive word "may" in subsection (b)(1). The word "may" in this context logically implies only that the claims administrator *may not* defer utilization review other than as prescribed in subsection (b)(1).

Injury to the low back, left shoulder, was found in this case because defendant's denial of the claim is not supported by the medical evidence. Defendants' argument that there was no medical evidence of a cumulative trauma prior to applicant's termination actually serves to defeat their reliance on a post-termination defense under Labor Code section 3600(a)(10) with respect to the cumulative trauma, because under subsection (D) of 3600(a)(10), the post-termination defense does not apply where the date of injury under Labor Code section 5412 is after the date of termination. Labor Code section 5412 defines the date of injury for a cumulative trauma as the date on which "the employee first suffered disability therefrom and either knew, or should have known, that such disability was caused by his present or prior employment." Since in this case there is no evidence that applicant knew prior to his termination that he had sustained compensable disability as the result of a cumulative trauma, or should have known that in the absence of medical evidence based on the existence of a medical report identifying a compensable cumulative trauma prior to the date of termination, the post-termination defense does not apply with respect to applicant's cumulative trauma injury.

With respect to post-termination evidence of a compensable cumulative trauma injury, the reports of orthopedic AME Dr. Feiwell are entitled to great weight due to his presumed expertise and neutrality as an agreed medical expert. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal. App. 3d 775). Dr. Fiewell found industrial injury in the form of a cumulative trauma to the lumbar spine and left shoulder, and although he did not note applicant reporting any dental complaints at the time of his orthopedic evaluation, Dr. Fiewell wrote that he would "have to defer to the appropriate specialist in the field of dentistry regarding whether applicant has a dental injury," (AME Report of Dr. Feiwell dated November 19, 2019, admitted as Court's Y, p. 2, line 5). Based on the fact that Dr. Fiewell is an orthopedist, not a dentist, and expressly deferred to a dentist with respect to dental injury, his remarks about not noting dental complaints at the time of his evaluation do not rebut the expert opinions of Mayer Schames, D.D.S. in dentistry, admitted as Lien Claimant's 7, 8, and 9, which are the only dental opinions in evidence. Remarks of the chiropractor PTP and PQME likewise do not rebut the sole dental expert opinion of Dr. Schames on such specialized questions as diagnoses of secondary dental injury in the form of bruxism, xerostomia, and periodontal disease arising out of and in the course of employment.

The opinion on decision accompanying this finding explained that Dr. Schames' reports constitute substantial medical evidence on the issue of causation of dental injury by reasonably linking bruxism to industrial pain symptoms, and linking periodontal disease from xerostomia to taking Advil for industrial pain symptoms as a matter of reasonable medical probability (Opinion on Decision, May 21, 2021, p. 3, lines 11-14). The opinion explained that inconsistent reporting of dental symptoms in the reports of non-dental physicians and chiropractors is insufficient to rebut the reasonable and probable indication of Dr. Schames that applicant had orthopedic pain, took Advil for it, and developed dental symptoms through the mechanisms explained by Dr. Schames (*Id*., p. 3, lines 14-17).

Based on the reports of Dr. Schames, admitted as Lien Claimant's 7, 8, and 9, which are the only medical expert opinions in the field of dentistry in evidence in this case, it was also found that the treatment and evaluation provided by the Dental Trauma Center was medically necessary. The opinion on decision explained that Dr. Schames' reports not only correlate the items of treatment and testing with the need to treat, evaluate, and determine the cause of the disputed injury, but also provide, in Lien Claimant's 7, detailed information about the need for, and efficacy of, each item of treatment and evaluation (Opinion on Decision, April 21, 2021, p. 4, lines 10-16).

Defendants' petition argues that inconsistent reporting of dental symptoms by chiropractors and an orthopedist preclude reliance of Dr. Schames' reports. However, it is well-settled the WCAB may rely on the medical opinion of a single physician unless it is based on surmise, speculation, conjecture or guess, and the opinions of Dr. Schames are considered substantial on the issues of dental injury, causation, and reasonableness and necessity of treatment because they have probative force on the issues, and are "more than a mere scintilla… such relevant evidence as a reasonable mind might accept as adequate to support a conclusion .... reasonable in nature, credible, and of solid value ...." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd*. (1983) 34 Cal. 3d 159, at 164).

Defendant's petition does not raise any issue with respect to the amount of payment ordered, so that issue should be deemed waived under Labor Code section 5904, and in any event the amount was based on an unrebutted *Kunz* study admitted as Lien Claimant's 10, and unrebutted billing expert testimony at lien trial. The 15% increase and 10% interest ordered under Labor Code section 4603.2(b)(1) are likewise not raised in the petition, and should therefore be deemed finally waived by operation of section 5904.

IV

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Date: 06/15/2021
Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Based on the stipulations of the parties at trial, it is found that applicant Jose Martinez Gonzalez, was employed on March 1, 2017 and during the period of November 12, 2016 through July 18, 2017, as a houseman. Based on the Agreed Medical Evaluator (AME) reports of Lawrence A. Feiwell, M.D. in orthopedics, admitted into evidence as Court's X and Court's Y, it is found that applicant sustained injury arising out of and in the course of employment to his low back, and left shoulder. Based on Dr. Feiwell's deferral to a specialist in the field of dentistry regarding whether applicant has a dental injury, and the reports of Mayer Schames, D.D.S., admitted as Lien Claimant's 7, 8, and 9, which are the only dental opinions in evidence, it is found that applicant also sustained secondary dental injury in the form of bruxism, xerostomia, and periodontal disease arising out of and in the course of employment. Dr. Schames' reports constitute substantial medical evidence on the issue of causation of dental injury, reasonably linking bruxism related to industrial pain symptoms and periodontal disease from xerostomia from taking Advil for industrial pain symptoms as a matter of reasonable medical probability. Inconsistent reporting of dental symptoms in the reports of non-dental physicians and chiropractors is insufficient to rebut the reasonable and probable indication of Dr. Schames that applicant had orthopedic pain, took Advil for it, and developed dental symptoms through the mechanisms explained by Dr. Schames.

Based on the stipulations of the parties at trial, it is found that at the time of injury, the employer's workers' compensation carrier was Chubb Indemnity Insurance, the employer has furnished some medical treatment, and the case-in-chief was resolved by C&R on January 16, 2020.

Based on California Code of Regulations, Title 8, Section 9792.9(b)(1), it is found that defendants are not entitled to retrospective utilization review, because there is no evidence that defendants reserved this right by issuing a written decision that complies with subsections (A) through (E) of Section 9792.9(b)(1) within five business days of receipt of the first Request for Authorization (RFA) from the Dental Trauma Center.

Based on the reports of Dr. Schames, admitted as Lien Claimant's 7, 8, and 9, which are the only medical expert opinions in the field of dentistry in evidence in this case, it is found that the treatment and evaluation provided by the Dental Trauma Center was medically necessary. Dr. Schames' reports not only correlate the items of treatment and testing with the need to treat, evaluate, and determine the cause of the disputed injury, but also provide, in Lien Claimant's 7, detailed information about the need for, and efficacy of, each item of treatment and evaluation.

Based on the *Kunz* study admitted as Lien Claimant's 10, showing full payment by other carriers and claims administrators for the full amounts charged for items billed in this case, including the full amounts charged for daytime and nighttime appliances for bruxism, and further based on the testimony of the only billing expert in evidence, Beth Gabler, it is found that there is no dental fee schedule, and that the reasonable value of services billed by the Dental Trauma Center in this case is $15,883.59, the amount indicated by Ms. Gabler in her unrebutted testimony (Minutes of Hearing and Summary of Evidence dated March 11, 2021, p. 7, lines 6-8). This is less than the full amount billed and reflects Ms. Gabler's reasoned opinion as an expert in dental billing.

Labor Code section 4603.2(b)(1) requires that the reasonable value of services be increased by 15%, plus 10% annual interest, because there is no evidence of a timely payment or explanation of review within 45 days of defendant's receipt of lien claimant's bill.

Accordingly, it is ordered that defendants Hospitality Staffing Solutions and Chubb Indemnity Insurance, administered by ESIS, pay to lien claimant the Dental Trauma Center the sum of $15,883.59, increased by 15%, plus 10% annual interest from defendant's date of receipt of lien claimant's bill as required by Labor Code section 4603.2(b)(1), and the lien claim is allowed in this amount.

DATE: 5/21/2021
Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE