WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IRINA GREENER PHILLIPS, ***Applicant***

vs.

COUNTY OF FRESNO; Permissibly Self-Insured, Administered by ACCLAMATION INSURANCE MANAGEMENT COMPANY, ***Defendants***

Adjudication Number: ADJ9650448
Fresno 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/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 29, 2021

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

IRINA GREENER PHILLIPS
TUSAN J. TUSAN, ATTORNEY AT LAW
GINA G. BARSOTTI, A PROFESSIONAL LAW CORP.

PAG/ara

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
AND
ALTERNATIVE PETITION FOR REMOVAL

INTRODUCTION

1. Applicant's Occupation Age at Injury	Engineer Tech II 45
2. Age at Injury	45
3. Dates of Injury	4/19/2013; 7/8/2013; 7/10/2013
4. Parts of Body	Lumbar Spine
5. Status of Claims	Accepted
6. Petitioner	County of Fresno
7. Timeliness	Timely Filed, 9/27/2021
8. Verification	Petition was Verified
9. Award Date	9/8/2021
10. Answer	Filed

PRELIMINARY STATEMENT

This case involves an Award of Temporary Disability over a certain period of time with the actual amount of money involved to be adjusted by the parties pursuant to Stipulation No 7 hereof, Finding of Fact No. 2, and Order No. 1, rendering the award of Temporary Disability a Final Order, as this case presented a threshold issue of entitlement to that benefit over a specific period of time.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefit. (*Aldi v. Carr, McClellan, Ingersol, Thompson & Horn* (20060 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc.) Threshold issues include, but are not limited to the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Ed. (Gaona) (2016)* 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenges to the propriety of the decision before the WCB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

Here, the undersigned's decision includes a finding regarding a threshold issue, that of entitlement to a certain period of Temporary Disability. Accordingly, the decision is a final order subject to reconsideration rather than removal. The decision rendered on September 8, 2021 could not be later challenged on Petition for Reconsideration.

It would appear, therefore, that petitioner's pleading should be treated as a Petition for Reconsideration rather than removal.

BRIEF SUMMARY OF THE CASE

Applicant herein claims three industrial injuries to the lumbar spine. The AME and the parties agree that the real injury was that of April 19, 2013, ADJ9650448. The remaining two injuries were merely a manifestation of the effects of the April 19 injury. For that reason, while the pending petition filed by petitioner cites all three cases, the reality is that we are only dealing with one date of injury. The undersigned's order of September 8, 2021 denied recovery on the remaining two injury claims. See Findings of Fact No. 6 and 7, and Order No. 5. Those Findings of Fact and the corresponding Order have not been challenged by either Party.

Applicant's claims were accepted as industrial and medical treatment was provided. At one point, a Request for Authorization for spinal surgery issued, and such was denied by the UR process. The denial was upheld by the IMR process. Following the denial, applicant self-procured the recommended spinal surgery, and such was followed by a period to Total Temporary Disability, and a period of Partial Temporary disability.

Defendant/Petitioner doesn't seem to oppose the fact that applicant was totally and partially disabled for the respective periods of time, but rather challenges it's compensability as such disability stems from a UR/IMR denied procedure.

CONTENTIONS

a. THERE ARE NO MEDICAL REPORTS TO SUPPORT APPLICANT'S SELF-PROCURED LUMBAR FUSION WAS NECESSARY ON AN INDUSTRIAL BASIS.

b. THE MEDICAL REPORTS DO NOT SUPPORT THAT THE LUMBAR FUSION WAS SUCCESSFUL.

c. THE LABOR CODE DOES NOT ALLOW A QME OR AME TO PROVIDE OPINIONS REGARDING MEDICAL TREATMENT.

STATEMENT OF FACTS

Applicant Irina Greener Phillips filed three Applications for adjudication of Claim all alleging injury to the back. The three dates of injury alleged are April 19, 2012, July 8, 2013 and July 10, 2013. The Agreed Medical Examiner, Dr. Ramsey, determined the subsequent claimed injuries were part of the original injury of April 19, 2013 (Joint Exhibit 7, AME Report of William Ramsey, MD. 2/18/20, admitted at 6/9/21 trial).

On July 22, 2015, a request for L4-5 transforaminal lumbar fusion submitted by Dr. Brant was denied by utilization review (Defendant's Exhibit A, UR Denial 7/22/2015, admitted at 6/9/2021 trial). On September 16, 2015, Maximus Federal Services Inc. issued an Independent Medical Review Final Determination Letter upholding the denial of the lumbar fusion (Defendant's Exhibit B, IMR Final Determination 9/16/2015, admitted at 6/9/2021 trial).

On November 13, 2015, applicant underwent the L4-5 transforaminal lumbar fusion with Dr. Brant on a self-procured basis (Defendant's Exhibit C, Operative Report of Adam Brant, M.D. 11/13/2015, admitted at 6/9/2021 trial.)

Defendant's disputed liability for any lost time/wages related to the self-procured lumbar surgery (Defendant's Exhibit D, Temporary Total Disability Delay Notice 6/9/2017. Admitted at 6/9/2021).

The matter was then set for trial on June 2, 2021 regarding whether applicant should be entitled to temporary disability indemnity benefits from November 13, 2015 through May 22, 2016 on an industrial basis. The parties stipulated to permanent disability, the date of injury and the permanent disability rating. The sole remaining issue, aside from attorney fees, was that of entitlement to temporary disability as outlined herein above.

DISCUSSION

a. MEDICAL REPORTS SUPPORTING LUMBAR SURGERY

In the course of his reporting, Dr. William Ramsey has stated the following:

> The need for surgery, as well as the treatment described by applicant beginning in 2013 and thereafter, appears to be a consequence of the industrial injury of April 2023. (Ramsey report of November 20, 2015, Joint Exhibit 1, Pg. 10).

In his report of May 24, 2017 (Joint Exhibit 4), he goes on to state:

> Given the history of back surgery in November 2015, release for her job six months postoperative, apparently without further restrictions, is appropriate and I would agree that (sic) his recommendations, concluded apparently by Dr. Tran, were appropriate (at Pg.2).

Regarding the nexus of the surgery in question and the underlying industrial injury, Dr. Ramsey states:

> It was noted at the time that she had been scheduled for surgery privately, such management under workers' compensation having been denied by Utilization Review, I agree that surgery was appropriate. Further, I felt that her industrial injury had contributed to such need despite preexisting problems for which surgery had not been planned to my knowledge (Ramsey, June 27, 2017, Joint Exhibit 5)

Lastly, with regards to the reasonableness of the surgery itself, Dr. Ramsey stated:

> She has failed reasonable efforts at conservative management, including injection therapy, to date, and apparently is scheduled to have surgery

> on a private basis, the industrial carrier having, through its utilization review agency, denied the requested surgical procedure. However, the surgical denial appears to be based on the lack of some desired last-minute information regarding new imaging and psychological testing for suitability, rather than lack of indication for surgery at all. (Ramsey, Joint Exhibit 1, November 20, 2015, Pg. 8).

While Defendant/Petitioner claims that there are no medical reports supporting that the surgery in question was necessary on an industrial basis, the record is replete with commentaries for the Agreed Medical Examiner, Dr. Ramsey, clearly supporting the surgery on an industrial basis.

b. SUCCESS OF LUMBAR FUSION

Petitioner claims that the surgery was not successful, and as such it must be determined that it was neither reasonable nor necessary. Neither the Board, the Courts, the labor Code nor Regulations make successful undertaking of a particular procedure a condition precedent to a determination of whether the procedure was reasonable. If that were the case, payment for procedures would always be premised on such contingency.

The fact is that a particular procedure may be successful on nine out of ten similarly situated patients, but not on one patient. That does not mean that the procedure was in any way not indicated, but rather an indication that not every human reacts identically to all others similarly situated.

Petitioner makes this claim, based in part upon the statement contained in Dr. Ramsey's report of October 3, 2016 (Joint Exhibit 2), to the effect that, at the time, applicant remained working on a modified position, similar to that in which she was engaged prior to the surgery. Such is hardly an indication of lack of success.

Following petitioner's logic, in the same report Dr. Ramsey does indicate that, overall, there is some improvement. That being the case, therefore, it would appear that the surgical intervention was at least partially successful.

Lastly, Petitioner contends that the surgery must not have been successful because prior to the surgery, applicant would have been rated at DRE Category IV, but subsequent to the surgery she is now at DRE Category V. The AMA guides are what they are. They are not subject to modification in terms of what factors are considered in rating a patient at a particular DRE Category. The patient is rated upon the factors provided by the Guides.

Review of the American Medical Association's Guides, 5th Edition, Pg. 384, Table 15-3 indicates that different factors apply on Category IV than do on Category V. Dr. Ramsey apparent felt that applicant's current situation best fit the factors noted in Category V. In addition, while Dr. Ramsey opined that absent surgery applicant would have been at the top range of DRE Category IV, post-surgery she was placed at the bottom range of DRE Category V, not a very substantial difference.

It would appear unprecedented to utilize the Whole Person Impairments provided by the Guides, as evidence of success of a particular procedure, ergo a retroactive determination of reasonableness of any particular medical undertaking.

c. THE LABOR CODE AND CASES DO ALOW COMMENTARY BY AMEs and QMEs ON MEDICAL PROCEDURES, ALBEIT THOSE COMMENTARIES CANNOT OVERRIDE UR/IMR DETERMINATIONS.

Medical opinions, even if offered after the fact, are often utilized in assessing reasonableness and necessity of a medical procedure, although those comments have no bearing on the determinations made by the UR/IMR process.

In Barela v. Leprino Foods (September 25, 2009, AD.13226482) [2009 Cal.Wrk. Comp, PD Lexis 482, the ruling was favorable to the applicant in that the Judge concluded that LC§ 4062(a) relieved the defendant of the cost of self procured surgery, but that was all that section provides. The judge relied on the hindsight opinion of Dr. Ansel which supported the reasonableness of applicant's surgical intervention. In contrast, in Ribeiro v. WCAB, (2015) 80 CCC 1222, the WCAB panel decided that applicant was not entitled to a period of temporary disability where the AME on that case concluded that self procured surgery was not necessary.

In short, contrary to petitioner's arguments, medical opinions on the reasonableness of treatment are useful in assessing entitlement to certain benefits, albeit it not at all controlling when it comes to the cost of medical treatment previously properly denied.

As the judge did in the matter of Go v. Sutter Solano Medical Center, ADJ10168011, following are excerpts of the Barela, *Supra* decision which are helpful to the instant analysis:

> No statute prohibits an-injured worker from self-procuring medical treatment. For workers' compensation purposes the issue when medical treatment is self-procured is whether the employer is liable for the reasonable cost of the treatment. (See *McCoy* v. *Industrial Acc. Com.* (1966) 64 Cal.2d 82 [31 Cal.Comp.Cases 93]; *Montyk* v. *Workers' Comp. Appeals Bd.* (1966) 245 Cal.App.2d 334; *Knight* v. *Liberty Mutual Ins. Co*; (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en bane); *Kagome Foods v. Workers' Comp. Appeals Ed. (Saladara)* (1999) 64 Cal.Comp.Cases 451 (writ den.).) Here, section 4062(a) relieves defendant of liability for the cost of the lumbar surgery applicant self-procured, but that is all that section provides.
>
> With regard to permanent disability, section 4660 mandates use of the AMA Guides and the 2005 Schedule. [*Almaraz* v. *Environmental Recovery Services/Guzman* v. *Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en bane) *(Almaraz)*.] Nothing in section 4660, the AMA Guides, or the 2005 Schedule limits an applicant's entitlement to permanent disability indemnity merely because a treating physician's request for authorization to perform spinal

> surgery was at some point lawfully denied, or because the employee at some point reasonably self-procured the surgery.
>
> Moreover, defendant did not rebut the presumption under section 4660 that the 2005 Schedule 'shall, be prima facie evidence of the percentage of permanent disability' to be attributed to an injury. Showing that an employee self-procured medical treatment is not evidence within 'the four corners of the AMA Guides' that contradicts and overcomes the prima facie correctness of the permanent disability rating calculated by the DEU using the AMA Guides and the 2005 Schedule. *(Almaraz, supra.)* It also makes no difference that the surgery was not authorized pursuant to the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM guidelines), or that it was self- procured. This is because Dr. Ansel expressly concluded in his November 12, 2007 report, albeit in hindsight, that the surgery 'was both reasonable and necessary.' That conclusion is supported by applicant's credible testimony that the surgery relieved the symptoms of his back injury. Thus, the other effects of the surgery were fairly considered by Dr. Ansel in his evaluation of applicant's permanent disability under the AM A Guides. *(Barela, supra,* 2009 Cal. Wrk. Comp. P.D. Lexis 482 *10-12.)

In Bucio v. County of Merced (March 23, 2015, ADJ 9203286) [1015 Cal. Wrk. Comp. P.D. LEXIS 123 we find a similar result. In that case, the WCAB panel concluded that applicant was entitled to temporary disability indemnity whether such stemmed from reasonable medical treatment provided by the defendant or reasonable medical treatment self procured by the applicant.

CONCLUSION

The statutes regarding the UR/IMR control payment for the cost of a requested medical procedure, but do not control the payment of temporary disability if the procedure is self procured and otherwise reasonable under the circumstances. Barela, *Supra*; Go *supra*.

RECOMMENDATIONS

It is recommended that the instant Petition for Reconsideration be denied, and that the Petition for Removal be dismissed.

DATE: 10/12/2021

Javier A. Alabart
WORK.ERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE