

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

SHERI EASTERLY, *Applicant*

vs.

**SOCIAL ADVOCATES FOR YOUTH SAN DIEGO, PSI; CYPRESS INSURANCE
COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,
*Defendants***

**Adjudication Number: ADJ11315552
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued on July 13, 2021,¹ wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) the March 8, 2021 Utilization Review (UR) determination was untimely; (2) defendant has no standing to challenge the type of review requested by the treating doctor; and (3) there is substantial medical evidence to support the request for home health care to be provided to applicant for twenty-four hours per day, seven days per week.

The WCJ awarded applicant home health care "at 24 hours per day, seven days per week as requested by Dr. Schweller" in his Request for Authorization (RFA) of March 4, 2021.

Defendant contends that (1) its March 8, 2021 UR determination was timely and, therefore, the WCJ lacks jurisdiction over the issue of medical necessity pertaining to Dr. Schweller's March 2, 2021 RFA for home health care of twenty-four hours per day, seven days per week; (2)

¹ Apparently relying upon the Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260), the WCJ emailed the F&A to defendant's attorney and designated him to effect service on the other parties. In that decision, the Appeals Board suspended WCAB Rule 10628, which requires the WCAB to effect service by mail unless a party has designated email for service. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) Although that decision stated that service by the WCAB may be made electronically with or without the parties' consent, it did not state that the WCAB may designate a party to serve a final decision, order or award. Therefore, district offices should still serve all parties of record with a final decision, order or award (whether electronically or otherwise), and not designate a party to do so.

defendant has standing to challenge Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis; and (3) twenty-four hours per day, seven days a week of home health care is not reasonable or medically necessary for applicant.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the F&A be amended to find that defendant has standing to challenge Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis but failed to prove that his request for expedited review was not applicable; and otherwise be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based upon our review of the record, and for the reasons expressed in the Report, which we adopt and incorporate herein, we will grant reconsideration and affirm the F&A, except that we will amend to find that Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis was at issue, but defendant failed to prove that the request for expedited review was not applicable; and to include the ninety day period requested by Dr. Schweller in the award of home health care.

The record reveals that the parties framed the issue of whether Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis as an issue of "standing." (Report, p. 8.) However, the WCJ determined that defendant failed to prove that Dr. Schweller's request for expedited review was not applicable on the merits. (*Id.*) Accordingly, we will amend to find that Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis was at issue, but defendant failed to prove that the request for expedited review was not applicable.

The record also reveals that Dr. Schweller's March 4, 2021 RFA requested home health care for applicant "at 24 hours per day, seven days per week for 90 days." (Report, p. 3.) However, the F&A awarded applicant "24 hours per day, seven days per week as requested by Dr. Schweller," without explicitly incorporating the ninety day period he sought. Accordingly, we will amend the F&A to include the ninety day period requested by Dr. Schweller in the award.

Accordingly, we will grant reconsideration and affirm the F&A, except that we will amend to find that Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis was at issue, but defendant failed to prove that the request for expedited review was not applicable; and to include the ninety day period requested by Dr. Schweller in the award of home health care.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on July 13, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on July 13, 2021, is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Dr. Schweller's assertion that his March 4, 2021 RFA should be evaluated on an expedited basis was at issue, but defendant failed to prove that the request for expedited review was not applicable.

* * *

AWARD

A. Home health care at 24 hours per day, seven days per week for 90 days as requested by Dr. Schweller in his request for authorization of March 4, 2021 and ongoing, until such time as there is a change in condition or circumstance to warrant a reduction in the frequency of care;

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 5, 2021

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

**SHERI EASTERLY
HIDEN ROTT & OERTLE, LLP
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**

SRO/ara

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 REMOVAL**

**I
INTRODUCTION**

1. Applicant's Occupation: Senior Program Director
Applicant's Age: 38
Dates of Injury: December 19, 2017
Parts of Body Alleged: Head, Neck, Hearing Impairment;
Right shoulder; Right Hip and
Vestibular Disorder

2. Identity of Petitioner: **CYPRESS INSURANCE
COMPANY;**

3. Timeliness: Petition was Timely

4. Verification: The Petition was verified.

5. Date of Issuance of Order: July 13, 2021

6. **Petitioner's Contention(s):**
 - A. The Utilization Review determination dated 3/8/2021 was timely and, as a result the WCAB lacks jurisdiction over medical necessity regarding the 3/2/2021 Request for Authorization by Dr. Schweller for home healthcare at 24/7;

 - B. Defendant does have standing to challenge a doctor's assertion that a request for treatment should be evaluated on an "expedited" versus "standard" timeline;

 - C. In the Totality of the Evidence the request for 24 hours per day, 7 days per week of home healthcare is neither reasonable or necessary;

**II
STATEMENT OF FACTS**

SHARI EASTERLY sustained admitted injuries to her head, neck, right shoulder, and right hip as well as suffering from a vestibular disorder.as result of a fall down a flight of concrete stairs on December 19, 2017. She hit her head on the metal railing, the concrete stairs and the concrete floor. She crawled to her car and called a co-worker for help. Her husband came and took her to emergency room.

The applicant has been diagnosed as having a traumatic brain injury, Irien Syndrome, Post concussive syndrome with chronic migraine, tinnitus, balance impairment, cervical neck strain with cervical paraspinal muscle spasms and cervicogenic headache. Currently, the applicant gets

dizzy when bending over. She has trouble with her balance. She reports nausea with the dizziness. She has a lack of coordination between her eyes causes the perspective to be off. This causes the dizziness and headaches as well. She has aching muscular pain in the cervical spine which radiates into her arms. Her pain is alleviated by sitting down, lying down, and use of a cane. She has difficulty sleeping. She has problems with driving. She uses a cane to assist with balance. She has to have help to do household chores. She needs to sit to shower. She has migraines three to four times per week lasting 3-5 hours per time. The migraines started after the injury. She avoids light, keeps the house dark and has difficulty with a computer screen due to her visual tracking issues. The applicant's condition is permanent and unlikely to improve since it has been three years from the date of injury. (See medical report of Dr. Clark Smith 2/5/2021 (App. Ex. 2); the Medical Report of Dr. Dan Whitehead 2/1/2021 (App. Ex. 3); evaluation by Promesa Home Care 7/31/2020 (App. Ex. 6); and Dr. Schweller's reports of October 25, 2020 (App. Ex. 5) January 15, 2021 (App. Ex. 4); February 22, 2021 (App. Ex.1).

On March 4, 2021, applicant's treating neurologist, Dr. Thomas Schweller issue a Request for Authorization for home care at 24 hours per day, seven days per week for 90 days. Up to this point, the applicant had been receiving home care at 12 hours per day, seven days per week (Stipulated Facts MOH/SOE 6/9/2021 2:21-2:1; Jt. Ex. 3, Def. Ex. A). On the RFA dated 3/4/2021 (Jt. Ex. 2) Dr. Schweller specified that the request was an "Expedited Review". Utilization Review issued a "Modification" on 3/8/2021 (Jt. Ex. 1).

Applicant filed a Declaration of Readiness to Proceed to an Expedited hearing alleging that the UR Determination was untimely as done later than 72 hours from the request on 3/4/2021. The matter proceeded to an Expedited Hearing on June 9, 2021. A Findings and Award was issued on July 13, 2021 finding that the Utilization Review Determination/Modification was late and then pursuant to *Dubon I* and *II*, issued an Order for the provision of home care at 24 hours per day, seven days per week for 90 days as requested by Dr. Schweller. It is from this Findings and Award/Order that defendants filed their timely and verified Petition for Reconsideration disputing the finding that the determination was untimely and that there was substantial medical evidence to support the request for medical treatment 24 hours per day, seven days per week.

III **DISCUSSION**

CONTENTION A: THE UTILIZATION REVIEW DETERMINATION DATED 3/8/2021 WAS TIMELY AND, AS A RESULT THE WCAB LACKS JURISDICTION OVER MEDICAL NECESSITY REGARDING THE 3/2/2021 REQUEST FOR AUTHORIZATION BY DR. SCHWELLER FOR HOME HEALTHCARE AT 24/7; and

CONTENTION B: DEFENDANT DOES HAVE STANDING TO CHALLENGE A DOCTOR'S ASSERTION THAT A REQUEST FOR TREATMENT SHOULD BE EVALUATED ON AN "EXPEDITED" VERSUS "STANDARD" TIMELINE;

These contentions are discussed together as they both involve "timeliness" of the UR Determination which gives the WCAB jurisdiction to issue an Order regarding medical treatment.

Both these contentions have no merit. First, attention is drawn to the fact that the doctor requested an *expedited review* so the review should have been done within 72 hours, not five business days. The defendants argue that the defendants should be allowed to have short periods of time to allow reassessment of the injured workers' condition. (Petition for Reconsideration page 4 lines 6-13). They further argue that an Order for the care deprives the defendants of further review (Petition for Reconsideration page 4 lines 14-22). The Order/F&A issued by the WCAB was in response to the Request for Authorization dated 3/4/2021 which requested care at 24 hours per day 7 days per week for 90 days. Thus defendants' arguments are not germane to the decision based on the RFA of Dr. Schweller dated 3/4/2021 (Jt. Ex. 2). Nor are they germane to the time limits to conduct an Expedited Review which is governed by Labor Code §4610(h)(5)(i)(3) because there is no such requirement written into the express language of Labor Code §4610(h)(5)(i)(3). Once the requirements of the sections (1) and/or (2) are met, the 72 hour requirement for determination is triggered.

Defendants then raise 8 CCR 9792.9.1(c)(4) as providing that "absent good cause" an expedited review shall be reviewed under the standard time of review, which allow 5 business days up to 14 where there is a request for additional information.

There was no request for additional information in this case. Therefore, the review was to be done within 72 hours if the applicant's condition met the requirements for expedited review. The regulation does not control the statute, rather it is limited to interpreting it. Labor Code §4610 set up provisions for standard review and for an expedited review. If the conditions precedent to an Expedited review exist, the review is required to be done in 72 hours. Determining medical necessity is the equivalent of determining which review is appropriate once the physician checks the box for Expedited Review.

In this case, the applicant has been diagnosed as having a traumatic brain injury, Irien Syndrome, Post concussive syndrome with chronic migraine, tinnitus, balance impairment, cervical neck strain with cervical paraspinal muscle spasms and cervicogenic headache. Currently, the applicant gets dizzy when bending over. She has trouble with her balance. She reports nausea with the dizziness. She has a lack of coordination between her eyes causes the perspective to be off. This causes the dizziness and headaches as well. She has aching muscular pain in the cervical spine which radiates into her arms. Her pain is alleviated by sitting down, lying down, and use of a cane. She has difficulty sleeping. She has problems with driving. She uses a cane to assist with balance. She has to have help to do household chores. She needs to sit to shower. She has migraines three to four times per week lasting 3-5 hours per time. The migraines started after the injury. She avoids light, keeps the house dark and has difficulty with a computer screen due to her visual tracking issues. The applicant is a fall risk, at the very least. The applicant's condition is permanent and unlikely to improve since it has been three years from the date of injury. (See medical report of Dr. Clark Smith 2/5/2021 (App. Ex. 2); the Medical Report of Dr. Dan Whitehead 2/1/2021 (App. Ex. 3); evaluation by Promesa Home Care 7/31/2020 (App. Ex. 6); and Dr. Schweller's reports of October 25, 2020 (App. Ex. 5) January 15, 2021 (App. Ex. 4); February 22, 2021 (App. Ex.1).

UR has agreed that home health care is needed, they simply modified the request to 12 hours per day, for **30** days. (Jt. Ex. 1 and 3; Jt. Ex. 2 and Def. Ex. A). Therefore, there is no dispute as to the need for home health care. This is a dispute over an request for expedited review by the treating physician to an *additional* 12 hours per day, seven days per week. The Utilization Review was

untimely so the WCAB retained jurisdiction to order the care requested via Expedited Review on Request of 3/4/2021. Defendants' arguments of public policy (Petition for Reconsideration page 6:4-8:11) are not a basis for overturning the decision of the WCAB in this matter. Further the public policy behind utilization review was to provide prompt review of needs for medical treatment to ensure the prompt provision of same without needless litigation.

As there is no legal or factual basis for these contentions, the Petition for Reconsideration should be denied.

CONTENTION C: IN THE TOTALITY OF THE EVIDENCE THE REQUEST FOR 24 HOURS PER DAY, 7 DAYS PER WEEK OF HOME HEALTHCARE IS NEITHER REASONABLE OR NECESSARY;

This contention has no merit. The legal standard is whether substantial medical evidence supports the requests for medical treatment. See *Sandhagen, citation omitted*.

SHARI EASTERLY sustained admitted injuries to her head, neck, right shoulder, and right hip as well as suffering from a vestibular disorder as result of a fall down a flight of concrete stairs on December 19, 2017. She hit her head on the metal railing, the concrete stairs and the concrete floor. She crawled to her car and called a co-worker for help. Her husband came and took her to emergency room.

The applicant has been diagnosed as having a traumatic brain injury, Irien Syndrome, Post concussive syndrome with chronic migraine, tinnitus, balance impairment, cervical neck strain with cervical paraspinal muscle spasms and cervicogenic headache. Currently, the applicant gets dizzy when bending over. She has trouble with her balance. She reports nausea with the dizziness. She has a lack of coordination between her eyes causes the perspective to be off. This causes the dizziness and headaches as well. She has aching muscular pain in the cervical spine which radiates into her arms. Her pain is alleviated by sitting down, lying down, and use of a cane. She has difficulty sleeping. She has problems with driving. She uses a cane to assist with balance. She has to have help to do household chores. She needs to sit to shower. She has migraines three to four times per week lasting 3-5 hours per time. The migraines started after the injury. She avoids light, keeps the house dark and has difficulty with a computer screen due to her visual tracking issues. The applicant's condition is permanent and unlikely to improve since it has been three years from the date of injury. (See medical report of Dr. Clark Smith 2/5/2021 (App. Ex. 2); the Medical Report of Dr. Dan Whitehead 2/1/2021 (App. Ex. 3); evaluation by Promesa Home Care 7/31/2020 (App. Ex. 6); and Dr. Schweller's reports of October 25, 2020 (App. Ex. 5) January 15, 2021 (App. Ex. 4); February 22, 2021 (App. Ex.1).

On December 3, 2020 UR reviewed the November 25, 2020 RFA from Dr. Schweller (Part of App. Ex. 5) and granted home health care at 12 hours per day, 7 days per week for **30** days. (Jt. Ex. 3).

Dr. Schweller requested authorization for an additional 12 hours per day, seven days per week on March 4, 2021 (Jt. Ex. 2) requesting an "expedited review". The additional 12 hours per day would provide home health at 24/7. Utilization Review modified this request on March 8, 2021, granting 12 hours per day, seven days per week for 90 days. The UR itself supports seven days a week of home care at 12 hours per day, The circumstances of the applicant's injury and its symptoms as

outlined by the medical reports in evidence provide substantial medical evidence to support the Request for Authorization from Dr. Schweller date 3/4/2021. This contention should be denied.

IV
RECOMMENDATION

The defendant seems to be particularly concerned with the finding (F&A page 3, Finding No. 2) that the defendant has no standing to challenge the type of review requested. This was not artful and merely mirrored the language the parties requested at the time of hearing. The finding should be that they have “standing” to challenge the type of review but that they had not met their burden of proof of the issue of whether request for “Expedited Review” was warranted in this case. Therefore, it is recommended that Finding No. 2 be amended to:

“Defendants have’ ‘standing’ to challenge the type of review but that they had not met their burden of proof to establish that the request for “Expedited Review” was not applicable in this case..

Otherwise, it is recommended that the Petition for Reconsideration be denied in all other respects.

Respectfully submitted,

LINDA F. ATCHERLEY
Workers’ Compensation Judge

Date: __August 18, 2021_____