WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL HUITRON, ***Applicant***

vs.

GREEN WASTE RECOVERY, INC.; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ8115072
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration, or in the alternative removal, of the Findings, Award & Order (FA&O) issued on November 2, 2023, by the workers' compensation administrative law judge (WCJ). In pertinent part, the WCJ deferred the issue of home health care services in the April 22, 2022 Request for Authorization (RFA) by Robert Harrison, M.D.; and found that the issue of the cardiology evaluation recommended by treating providers Dr. Harrison and Justin Lo, M.D., was moot because the evaluation has occurred.

Applicant contends that the WCAB has jurisdiction to award home health care services and that the evidentiary record supports his need for services; and that the WCJ erred in deferring the issue. Applicant further contends that the scope of the cardiology was at issue and that the WCJ erred in finding the issue moot; and that applicant is entitled to a cardiology consultation with Hossein Shenasa, M.D.

We received an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending we deny reconsideration.

We have considered the allegations in applicant's Petition, defendant's Answer and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below as well as the WCJ's Report, which we adopt and incorporate, as our Decision After Reconsideration, we will affirm the WCJ's November 2, 2023 FA&O.

BACKGROUND

The parties stipulated applicant, while employed on November 16, 2011 as a sorter for defendant sustained an industrial injury to the lumbar spine, psyche, sleep disorder, lungs (respiratory system), sexual dysfunction, gastrointestinal system, and urological system, and further claims injury to the cardiovascular system, with any other body parts deferred. (Minutes of Hearing and Summary of Evidence (MOH/SOE, 03/28/2023, 2:8-16.)

At trial, the parties submitted, among other issues, the following issue for adjudication: need for medical treatment (in the form of home health care and a consultation in cardiology). (MOH/SOE, 03/28/2023, 2:27-30.)

In his prescription note dated April 22, 2022, Dr. Harrison requested authorization for general attendant care for six hours per day, five days per week, transportation for two hours per day, three days per week, and housekeeping services for six hours per day, two days per week. These services include assistance with bathing, medications, caretaking, housecleaning and cooking. (App. Ex. 64.) In an email dated April 25, 2022, Eunhee Kim inquired whether this was the initial request for attendant care and noted that a request for authorization supported by a medical report would be required to document medical necessity. (Def. Ex. T.)

On April 26, 2022, Ms. Young responded to Dr. Harrison, stating the request was incomplete due to a lack of documentation to substantiate the clinical reasoning. (Def. Ex. R, p. 2.) In an e-mail exchange during the period April 25, 2022 to May 12, 2022, Ms. Young dismissed a prescription for home health assistance as "completely unsubstantiated," asserting that applicant is capable of caring for himself and that his wife was seeking repeated testing without merit. In response, Dr. Harrison noted that applicant reported difficulties with his ADLs (activities of daily living), leading him to complete a home health assistance services form and inquire about a formal home assistance assessment. Ms. Young further questioned the necessity of the services requesting that Dr. Harrison identify the specific tasks and challenges that applicant claims he cannot manage. (Def. Ex. KK.)

Good Samaritan Hospital transitioned applicant to home health care services upon his discharge on January 23, 2023. (Def. Ex. JJ, p. 61.) Case managers coordinated with ProHealth Home Care, Inc., which provided pro bono home visits to resolve billing conflicts between Medi-Cal and workers' compensation. (*Id.* at p. 296.) Although applicant's wife challenged the discharge and requested a transfer to a skilled nursing facility, the medical team

concluded applicant was stable for home care and did not meet the criteria for inpatient rehabilitation. (*Id.* at p. 297.)

At the trial, with respect to home health care services, Ziva Huitron, applicant's spouse, testified that applicant requires extensive home health care services due to his physical limitations and status as a high fall risk. (MOH/SOE, 03/28/2023, 9:18-20, 9:24-29.) She testified that she performs all household chores, driving, cooking, and cleaning, and actively assists the applicant with daily activities, including showering, washing his legs, dressing, and self-catheterization. (MOH/SOE, 03/28/2023, 8:41-45; 9:26-36.) Ms. Huitron further testified that Dr. Harrison recommended home health care services in April 2022 after she emailed him to outline applicant's deficits in his ADLs. (MOH/SOE, 05/02/2023, 5:34-43.)

Defendant's claims examiner Nicole Young testified that she received the April 2022 request for home health care services but did not submit it to utilization review because the request lacked an attached report or medical justification. (MOH/SOE, 05/02/2023, 6:36-45.) Ms. Young testified she requested specific details regarding applicant's deficits from Dr. Harrison, who replied that the ADLs needed addressing but failed to provide the requested specifics. (MOH/SOE, 05/02/2023, 7:1-8.) For that reason, she did not submit the request through utilization review. (MOH/SOE, 06/22/2023, 6:27-33.) Furthermore, Ms. Young testified that while Good Samaritan Hospital recommended a 24-hour home health care services evaluation following a January 2023 admission, she determined the hospital stay was nonindustrial and later learned from ProHealth Home Care, Inc., that applicant refused the evaluation altogether. (MOH/SOE, 08/24/2023, 6:44-45; 7:4-9.)

With regard to the cardiology consultation, Ms. Huitron testified that applicant desires a cardiology consultation to ensure he has no underlying heart issues prior to undergoing further back surgery, noting that medical staff recorded elevated cardiac enzymes during a previous procedure. (MOH/SOE, 05/02/2023, 5:21-25.) She further testified that Dr. Harrison recommended a consultation with Dr. Shenasa, but defendant initially denied the request. (MOH/SOE, 05/02/2023, 5:25-27.)

Ms. Young testified that she initially questioned a request for a cardiology consultation from Dr. Lo because he indicated it was required before prescribing Celebrex, a medication applicant had failed to actively refill. (MOH/SOE, 05/02/2023, 8:4-12.) Ms. Young testified that she subsequently authorized the cardiology consultation after Dr. Harrison and Dr. Lo clarified

that the evaluation was necessary before starting Celebrex and before proceeding with back surgery. (MOH/SOE, 08/24/2023, 5:30-42.) Ms. Young testified she authorized the consultation with Dr. Shenasa and confirmed that the appointment occurred. However, Dr. Shenasa's office refused to provide defendant with the billing or the medical report. (MOH/SOE, 08/24/2023, 10:11-16).

Ms. Huitron corroborated that applicant self-procured the consultation with Dr. Shenasa and obtained a report, but she acknowledged applicant had not yet served the report on defendant. (MOH/SOE, 08/24/2023, 9:24-29.)

On November 2, 2023, the WCJ issued the decision ordering development of the record on the issue of home health care services and deemed the need for a cardiovascular consultation moot.

It is from this decision that applicant seeks reconsideration.

DISCUSSION

I.

An aggrieved party may only file a petition for reconsideration from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order is one that determines either any substantive right or liability of the parties involved in the case or resolves a threshold issue that is fundamental to the claim for benefits. (*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]; (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not "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*, 211 Cal.App.3d 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.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the law treats the petition for relief as

a petition for reconsideration because the decision resolves a threshold issue. However, if the aggrieved party challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes findings of employment, injury AOE/COE, and insurance coverage. These are final orders subject to reconsideration and not removal. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075.) Although the decision contains findings that are final, applicant is only challenging interlocutory findings and orders regarding an order to develop the record on applicant's need for home health care services and his entitlement to a medical-legal cardiovascular consultation. Therefore, we will apply the removal standard to our review. (See *Capital Builders Hardware v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

Removal is an extraordinary remedy rarely exercised by the Appeals Board and only if the petitioner shows that substantial prejudice or irreparable harm will result if not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez v.Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) In addition, the aggrieved party must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

II.

In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that disputes regarding medical treatment are to proceed as follows:

1. A utilization review (UR) decision is invalid and not subject to independent medical review (IMR) only if it is untimely.

2. Legal issues regarding the timeliness of a UR decision must be resolved by the Workers' Compensation Appeals Board (WCAB), not IMR.

3. All other disputes regarding a UR decision must be resolved by IMR.

4. If a UR decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5.[1]

(*Id.* at pp. 1299-1230.)

Section 4600(h) provides that home health care services are medical treatment, but a physician must prescribe them. In *Neri-Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc), the Appeals Board stated that "in order to obtain an award of home health care services, section 4600(h) requires applicant to show that he had a prescription, that it was received by defendant, and that he met the requirements of section 5307.8." (*Id.* at pp. 688-689.) The prescription "is either an oral referral, recommendation or order for home health care service for an injured worker communicated directly by a physician to an employer and/or its agent." (*Id.* at p. 693.)

Here, there is no dispute that defendant received Dr. Harrison's prescription for home health care services, but neither investigated the request nor took any action to submit the request to utilization review for medical reasonableness. Accordingly, the WCJ did have jurisdiction to address the medical treatment request.

Although defendant did not timely deny by utilization review the requested medical treatment, this does not mean that applicant is automatically entitled to it. He must still meet his burden of proof on medical necessity as follows:

> Where there is no timely UR decision subject to IMR, the issue of medical necessity must be determined by the WCAB. (§§ 4604, 5300.) However, as explained by [*Sandhagen v. Workers' Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 981, 990]:
>
> > "The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. Accordingly, notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5)."

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

> Thus, where a defendant's UR decision is untimely, the injured employee is nevertheless entitled only to "reasonably required" medical treatment (§ 4600(a)) and it is the employee's burden to establish his or her entitlement to any particular treatment (§§ 3202.5, 5705), including showing either that the treatment falls within the presumptively correct [Medical Treatment Utilization Schedule (MTUS)] or that this presumption has been rebutted. (§ 4604.5; see also § 5307.27.) Moreover, to carry this burden, the employee must present substantial medical evidence.

(*Dubon II*, *supra*, 79 Cal. Comp. Cases at p. 1312.)

In other words, applicant must show that the requested medical treatment is reasonably required to cure or relieve the effects of the injury and is supported by the MTUS adopted under section 4604.5 or by other evidence-based medicine that rebuts the MTUS (Lab. Code, §§ 4600(a), 4600(b), 5307.27; Cal. Code Regs., tit. 8, §§ 9792.20, 9792.25.1).

The Appeals Board must base its decisions on substantial medical 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].) To constitute substantial evidence, a medical opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Medical reports and opinions do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical opinion cannot support the Appeals Board's findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Furthermore, "in order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in

all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264].) "[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims" and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary. (*Tyler*, *supra*, 56 Cal.App.4th at p. 394.) An adequately developed record affords all parties due process of law and further provides for meaningful review by the Appeals Board of a WCJ's decision. (*Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]; *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343, 346-347 (Appeals Board significant panel decision).)

Pursuant to sections 5701 and 5906, a WCJ or the Appeals Board may not leave undeveloped issues that, through the exercise of its specialized knowledge, recognizes as requiring further evidentiary development. (*Kuykendall*, *supra*, 79 Cal.App.4th at p. 404.)

Here, upon a comprehensive review of the evidentiary record, we concur with the WCJ that the current medical documentation is acutely insufficient to support an immediate award for home health care services. Crucially, the prescribing physician, Dr. Harrison, failed to provide a necessary medical rationale grounded in the MTUS or alternative evidence-based medicine to justify the authorization of this specific treatment. As noted by the WCJ, Dr. Harrison could not articulate the precise parameters of applicant's daily assistance needs and instead actively inquired about procuring a formal evaluation to assess those exact functional deficits. Mandating further development of the record, such as directing a functional capacity evaluation to delineate formally applicant's specific limitations and required services, is a vital exercise of the WCJ's duty to ensure a fully adjudicated and factually sound record. Because this procedural directive merely seeks to cure these evidentiary deficiencies prior to a final determination, applicant has failed to demonstrate that he will suffer substantial prejudice or irreparable harm from this interlocutory order.

III.

We next address the denial of the cardiovascular consultation. We emphasize that the law distinguishes consultations from medical treatment. Rather, they constitute a form of medical-legal expense. By definition, a consultation serves to diagnose a condition rather than to treat it, placing

it squarely within the category of diagnostic medical-legal costs. (Lab. Code, § 4620.) Whether a medical-legal expense is compensable depends on whether the expense is "reasonably, actually, and necessarily incurred." (Lab. Code, § 4621.) While a primary treating physician may request authorization for a consultation, such a request is not generally subject to utilization review, but instead is simply seeking defendant's agreement that the medical-legal expense is reasonable before it is provided. (*Lira v. A.G. Production Co.* [2026 Cal. Wrk. Comp. P.D. LEXIS 27, *3-4].)[2]

Here, the evidentiary record established that Dr. Harrison requested authorization for a medical-legal consultation with Dr. Shenasa, a request that defendant ultimately and expressly authorized during the course of the trial proceedings given applicant's back surgery. It is undisputed that applicant subsequently attended this consultation and secured a medical report. While applicant argues that an ongoing dispute persists regarding the fundamental scope or characterization of this authorization, the record is devoid of any discernible evidence outlining the contours of this conflict or identifying the precise judicial relief currently sought. Because applicant's successful completion of the consultation satisfies the core objective of the request, the WCJ possessed a sound legal basis to deny the request as moot. Consequently, we conclude that the WCJ's disposition of this matter does not subject applicant to any irreparable harm.

Accordingly, we affirm the FA&O.

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[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 2, 2023 Findings, Award & Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 5, 2026

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

MIGUEL HUITRON
BOXER & GERSON, LLP
LAUGHLIN, FALBO, LEVY & MORESI, LLP

DLP/md

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION/REMOVAL

I.
INTRODUCTION

Applicant, Miguel Huitron, while employed on 11/16/2011, as a sorter, in San Jose, California, by Green Waste, sustained an injury arising out of and arising in the course of employment to the lumbar spine, psyche, lungs (respiratory), gastrointestinal system, and urological system, with injury resulting in a sleep disorder and sexual dysfunction, and claims to have sustained an injury arising out of and in the course of employment to the cardiological system with any other body parts deferred.

The Findings and Order/Findings and Award/Opinion on Decision in this case issued on 11/02/2023. The Petitioner is Applicant who has timely filed the verified Petition for Reconsideration/Removal on 11/27/2023 [received in EAMS on 11/24/2023 but that was a holiday so deemed received on 11/27/2023]. The Petition for Reconsideration/Removal is not legally defective. Defendant has not filed an Answer as of 12/07/2023.

Petitioner contends that it was error to order development of the record as to home and attendant care and that it was error to not award a cardiology consultation.

II.
FACTS

Applicant suffered a specific injury to his back on 11/16/2011. He has undergone multiple surgeries (circa 2012 and 2014) which have essentially failed. He has developed compensable consequence conditions to include multiple body systems.

Applicant has received a prescription for home health/attendant care via a Request for Authorization [RFA] from Dr. Harrison, and also has an RFA from Dr. Harrison for a cardiology consultation with a Dr. Shenasa. There were other issues set for trial in this most recent round of litigation, and those determinations are not subject to the Petition for Reconsideration/Removal filed by Applicant.

After days of testimony from Applicant's spouse and from the claims adjuster, this matter was submitted and decided. Applicant has filed a timely Petition for

Reconsideration/Removal. The order as to the home health/attendant care was for further development of the record and therefore it does not appear to be a final order subject to Reconsideration; Removal is the proper remedy and the Petition will be reviewed considering Applicant's burden of substantial prejudice and/or irreparable harm. As to the cardiology consult, the consultation occurred between days 2 and 3 of trial and therefore it was determined that the issue was moot and no further determinations were made. As to that determination, it would appear that the determination is a "final order," subject to Reconsideration.

III.
LEGAL ARGUMENTS

1. WILL APPLICANT SUFFER SUBSTANTIAL PREJUDICE OR IRREPARABLE HARM FROM THE ORDER TO DEVELOP THE RECORD AS TO THE RFA FOR HOME HEALTH/ATTENDANT CARE?

As the medical record is extensive and the facts somewhat convoluted, the following is excerpted directly from the F&O 11/2/23 with discussion as to Applicant's contentions following thereafter:

Dr. Robert Harrison saw Applicant on or about 03/31/22 and issued a report. In said report, Applicant was complaining of severe low back pain, left leg weakness and was using a cane. Applicant reported a recent recommendation for a third surgery with hardware removal. Pursuant to the report, there was a treatment plan outlined which included a repeat EMG to evaluate the left leg weakness, a surgical consult with a Dr. Berven, a physiatry consult with a Dr. Zheng and a recommendation that Applicant return to the clinic in 4 weeks. [Defendant Exhibit P.]

Thereafter, Dr. Harrison issued a prescription dated 04/21/22 marked "Home Health/Attendant Care" with a prescription start date of 04/20/22 and recommending care as follows:

General attendant care:	6 hours per day, and 5 days per week
Providing transportation:	2 hours per day, and 3 days per week
Housekeeping services:	6 hours per day, and 2 days per week

It is noted in the prescription that the patient's condition warrants the home/attendant care as follows: assist with bathing, medications, catheters, house cleaning and cooking. [See Applicant's Exhibit 64]

This prescription was received by Defendant 04/25/22 and Defendant thereafter sent a letter to Dr. Harrison indicating that there was no documentation to support the request and to please provide a detailed narrative to support the request. [Defendant's Exhibit R].

There was also an email from the Nurse Case Manager Eunhee Kim on 04/25/22 indicating she had also received the Home Health/Attendant Care prescription and commenting that since this was a prescription only, she assumed an RFA and report would be required. [Defendant's Exhibit T].

There are also copies of the emails between the claims examiner Nicole Young and Dr. Harrison about this prescription, with Ms. Young complaining on 04/26/22 that there are a lot of unsubstantiated demands from the injured worker and his wife, and noting there is no basis for home health/attendant care as the injured worker can care for himself. **Dr. Harrison responds with a question as to whether there is some way to have an evaluation for this home health need.** The claims examiner responds with a question of who made the request and why, since there was no indication for necessity. Dr. Harrison responds on 04/27/22 indicating that the patient has described challenges with activities of daily living and therefore the doctor completed the form. **He again asks if an evaluation can be arranged in order to assess the needs.** Nearly three weeks later on 05/12/22 Ms. Young asks what the specific challenges are and asks about what specifically Applicant cannot do. [Defendant's Exhibit KK]

There is no further information on this issue thereafter until January 2023 in connection with Applicant's hospitalization at Good Samaritan Hospital. **The hospital records show that the hospital was trying to arrange home health care through ProHealth but that Applicant's wife, Ziva, said not to arrange it yet as she doesn't feel it necessary at this time, that she will be going to court soon and she will get it then.** [Defendant's Exhibit JJ] There is a 01/18/23 letter from ProHealth to Defendant with rates, but said letter is not a prescription, it is not signed, it does not specify what care is requested or anticipated, there is no indication of the number of days or hours per week, there is no justification for the care or statement of causal connection with the industrial injury – just a listing of hourly rates. The

01/28/23 letter cannot be deemed a request for authorization nor a prescription as it meets none of the enumerated requirements. There is a notation that services will not be authorized and said denial is dated 01/20/2023. I do not consider this a valid request for services.

The trial testimony indicates that Applicant has NOT discussed his activities of daily living with Dr. Harrison. [MOH/SOE 03/28/23, 9:8-9] Ms. Young admitted that she did not put the home health prescription through to utilization review and confirms that a letter was sent to Dr. Harrison notifying him that his request was incomplete. [MOH/SOE 05/02/23, 11:37-45] Ms. Young testified that she asked Dr. Harrison for additional information but received no final response from Dr. Harrison. [MOH/SOE 06/22/23, page 6] Ms. Young did admit that Dr. Harrison asked about an evaluation and that she did not respond at that time. [MOH/SOE 08/24/23, 4:13-34] As to the more recent issue with home health as related to the Good Samaritan hospitalization, Ms. Young noted that **the Good Samaritan records showed an intent by Pro Health to schedule an evaluation and that the patient refused** (as noted herein above). [MOH/SOE 08/24/23, 7:4-9] Ms. Huitron testified that she understood ProHealth was trying to obtain authorization but that it was denied by the claims adjuster. [MOH/SOE 08/24/23, 8:30-34].

It is determined that the prescription by Dr. Harrison is lacking in information. It is determined that Ms. Young properly and timely requested additional information. It is determined that the additional information was not provided and therefore there should have been a conditional denial pursuant to 8CCR 9792.9.1(f). That conditional denial was to have listed what specifically claims needed to consider the request and that the request would be reconsidered once said specific information was received. That conditional denial was to have been served on the doctor, Applicant and Applicant's counsel. This was not done. As such the review by claims was improper. Further, there was no submission to utilization review, and subsequently no denial by utilization review, depriving Applicant of the possibility of pursuing the issue through Independent Medical Review [IMR].

As utilization review was not conducted at all, and what was done was not properly conducted, this Judge has jurisdiction to address the issue and can the authority to award the care **if medical necessity has been established**. I cannot do so in this case for several reasons:

1) Applicant's spouse has testified that she has been present at all medical appointments and that Applicant has NOT discussed his activities of daily living and his needs with Dr. Harrison;
2) Dr. Harrison was unable to provide specific reasons as to why Applicant needed home health care/attendant care when specifically asked, and in turn requested an evaluation so that he could answer the question;
3) Dr. Harrison was unable to specify exactly what assistance Applicant needed and again inquired if an evaluation could be performed in order to answer that specific question.

As in the *en banc* decision of *Neri Hernandez* [79 CCC 682] the record needs to be developed so that we know what services are needed. It is recommended that Dr. Harrison, perhaps with the assistance of the nurse case manager, schedule a functional capacity evaluation so that Applicant's tolerances and abilities can be formally assessed, and then Dr. Harrison can provide a new prescription together with the detailed narrative report requested by Defendant, as to what services are needed and why. As in *Hernandez* it is apparently necessary to know what services the spouse has performed **before and after the injury** so someone will need to make such an inquiry and take that information into consideration. If this is outside of Dr. Harrison's area of specialization/expertise, it would appear that there are agencies that specialize in such assessment such as ProHealth who was set to schedule such an evaluation.

In summary, the prescription was incomplete and Defendant's response was incomplete/improper. While jurisdiction is conferred upon this Judge to act, I am unable to do so without more information.

Addressing Applicant's Petition:

Applicant references a few comments from various medical providers in 2014 and 2016 during the time Applicant was undergoing the various surgeries. While these are certainly selected comments from the vast collection of medical records in this case, and while they may be relevant, the comments are 7-9 years old, related to surgery at the time, and cannot be solely relied upon to support an RFA from 2022. Further, these are not themselves RFAs. There are more

recent selected excerpts from various medical records, also commenting on activities of daily living [ADLs] Again, while relevant, these are not RFAs from the various quoted physicians.

Here, there is a specific RFA at issue and the issuing physician is charged with the obligation of supporting the RFA, rather than having a judge sift through thousands of pages of medical records over a 12-year period in order to justify the RFA for the physician. What Applicant's counsel has done, in gathering commentary from various doctors over a nearly 10-year period, is what Dr. Harrison was to have done in order to support the RFA. It is not the obligation of the Applicant's attorney to support an RFA by a collection of various comments. It is the obligation of the prescribing physician to support the RFA. Dr. Harrison was asked to do this several times by claims and failed to do so.

The law is clear that if utilization review is not undertaken or is not timely performed then a judge can award the requested care if medical necessity is shown. Here, while there is an RFA, medical necessity has not been established **by Dr. Harrison** who issued the RFA. I have no knowledge that Dr. Harrison has ever reviewed any of the selected commentary identified by Applicant's counsel, and if he has seen such medical records, whether he is in agreement that the observations going back to 2012 are still accurate.

MOST IMPORTANTLY: It is recalled that Dr. Harrison himself stated that Applicant should undergo some sort of evaluation in order to determine his actual needs. Dr. Harrison was apparently unable to articulate what exactly Applicant needed and why. As the RFA was from Dr. Harrison, and he himself had questions which were never addressed, then it logically follows that we need more information on this issue.

Furthermore, Mrs. Huitron testified that Applicant has never discussed his ADLs with Dr. Harrison. Applicant's contention in his Petition that there has been discussion regarding functional losses and the ADLs is completely inconsistent with the testimony at trial.

The burden of proof here, since there is no final order, is substantial prejudice or irreparable harm. Applicant has not established any substantial prejudice or irreparable harm in his Petition. Had this Judge denied Applicant's request outright, Applicant would have been free to return to Dr. Harrison to have Dr. Harrison "do it right." There is no one-year-IMR-ban as to this RFA and Applicant has always been free to simply undergo an evaluation and have Dr. Harrison properly substantiate the RFA.

Applicant relied upon the *en banc* decision of *Neri Hernandez*. In *Hernandez* there was a strikingly similar RFA and the matter was remanded for development of the record. I strongly encourage the Board to affirm the determination of having Applicant go the appropriate evaluation to determine his actual needs as requested by Dr. Harrison and we can proceed from there. That determination cannot possibly be prejudicial or harmful to Applicant.

2. **CARDIOLOGY CONSULTATION WITH DR. SHENASA**

The following is excerpted directly from the F&O 11/2/23 with discussion as to Applicant's contentions following thereafter: The facts surrounding the cardiology consult are extensive and therefore a recitation of the medical history is necessary.

Applicant was seen by Dr. Robert Harrison on or about 03/31/22 and Dr. Harrison issued a report of that date. In said report he noted Applicant complained of severe low back pain, left leg weakness and was using a cane. It was noted Applicant was recommended a third surgery for hardware removal. The plan was to repeat the EMG to evaluate the left leg weakness and to schedule a surgical consult with a Dr. Berven and a physiatry consult with a Dr. Zheng. Applicant was to return for follow-up in four (4) weeks. **There is no mention of any cardiac complaints, cardiac concerns, cardiac findings or cardiac related recommendations in this report.** [Defendant's Exhibit P]

There is an email from nurse case manager Eunhee Kim dated 04/14/22 referencing that Ms. Kim followed up with Dr. Harrison about **Ms. Huitron's** request for a cardiology consult for Applicant. Ms. Huitron had stated an RFA would be forthcoming from Dr. Harrison thus the follow-up. Dr. Harrison in turn asked Ms. Kim: what are the cardiology issues and how did they relate to the industrial claim? The nurse drew an inference that since there was no determination by Dr. Harrison of an industrial connection then no cardiology consult would be authorized through workers' compensation and Applicant should seek that care outside of workers' compensation. [Defendant's Exhibit CC].

However, Dr. Harrison then issued an RFA dated 04/21/22 which was marked a "new request" for a cardiology consult with a Dr. Shenasa. The fax cover which accompanies the RFA indicates "Please see attached RFA and office visit notes for Miguel Huitron to receive cardiology consultation with Dr. Hossein Shenasa." While there is in fact an RFA and office visit notes (the 03/31/22 report referenced herein-above) again there is NOTHING which references a need for a cardiology referral. [Defendant's Exhibit O]

As expected, Defendant immediately responds to this RFA with a letter dated 04/25/22 indicating that there was no documentation to support the request. A detailed narrative is requested and Dr. Harrison is informed that a new review will be performed once a complete request is received. [Defendant's Exhibit Q]. An email was also sent to Dr. Harrison on 04/25/22 and Dr. Harrison responded that he would be sending his latest exam notes with an explanation. [Defendant's Exhibit S]. There are additional emails between Dr. Harrison and Defendant on this issue, with Dr. Harrison responding further on 04/26/22 that Applicant was requesting a cardiology consult to determine any risk factors for another surgery and Dr. Harrison indicates that this seems "legit" to him. Ms. Young responds that surgery has been denied and therefore there is no need for a cardiac clearance. [Defendant's Exhibit KK] There is no further follow-up by Dr. Harrison at this time and there is no detailed narrative provided in response to the written request. It appears the 04/25/22 letter is an appropriate conditional denial per 8CCR9792.9.1(f).

There is additional reporting from Dr. Harrison on 05/09/22 noting that he advises a cardiology consult "if surgery is approved." There does not appear to be an RFA in connection with this report. [Joint Exhibit 7] There is no evidence of any pending surgery recommended or approved.

Applicant then saw Dr. Seago on or about 06/08/22. Dr. Seago has performed the two surgeries on Applicant's lumbar spine. Dr. Seago issued a report and issued two (2) RFAs, one for a CT scan without contrast and the other a prescription for Celebrex. In the accompanying report, Dr. Seago notes the complaint of low back pain and increasing left leg weakness since May 2022. He notes that Applicant was seen by Dr. Rustamzadeh who recommended a third surgery **and Applicant chose not to proceed with that recommendation.** He notes he is prescribing Celebrex for pain control. [Defendant's Exhibit EE].

Applicant was then seen by Dr. Cahn who issued a letter address "To whom it may concern" dated 06/17/22. This letter indicates that the patient's injury requires a cardiac clearance with consultation and whatever cardiac testing the cardiologist feels necessary prior to anticipated upcoming neurosurgery. There are additional recommendations unrelated to the issue being addressed. Dr. Cahn indicates these are all industrial and are to be done urgently in connection with the upcoming surgery. [Applicant's Exhibit 60]. However, there was no upcoming surgery and it is unknown what surgery Dr. Cahn was contemplating.

Nevertheless there was a request for a cardiology clearance in connection with a surgery. I have no information whether this "letter" was directed to Defendant, ever received by Defendant, or if Defendant ever responded to this letter if in fact received. This letter does not meet the requirements of an RFA.

Applicant was then seen by Dr. Lo on or about 07/11/22. Dr. Lo issued a report dated 07/11/22. In his report, Dr. Lo notes that Dr. Seago prescribed Celebrex and that the doctor "asked him [Applicant] to have cardiac eval before starting d/t chest pain." It is not clear that Dr. Lo himself is seeking authorization or if he is simply making a recommendation directly to Applicant. There is an RFA but the RFA makes no reference to the cardiac evaluation. [Defendant's Exhibit FF and Joint Exhibit 6]

Applicant is then seen by Dr. Harrison, who issues an RFA dated **08/08/22** marked "new request" seeking a cardiology consult. There is a report of the same date in which Dr. Harrison notes that Dr. Lo has advised that a cardiac evaluation is needed before Applicant starts Celebrex. Dr. Harrison notes that the Celebrex has been approved by utilization review following the examination and prescription by Dr. Seago on 06/08/22. Dr. Harrison notes that he is in agreement with Dr. Lo's recommendation of a cardiac evaluation being necessary given Applicant's history of chest pain. The treatment plan in relevant part reads: "**I advise cardiology consultation if surgery is approved, this should be part a pre-op clearance."** [emphasis added]. While there is an RFA and a report, the reasons contained within the report are internally inconsistent. On the one hand Dr. Harrison says the need for the cardiology consult is to evaluate chest complaints before starting Celebrex. On the other hand, Dr. Harrison says the need for the cardiology consult is as a pre-op clearance if surgery is approved. [Applicant's Exhibit 56] It is noted that I have no evidence as to when this RFA was sent to Defendant, or if it was mailed or faxed or emailed, etc.

In response, Defendant sends a letter dated **09/01/22** further complicating things by noting that Dr. Lo did not prescribe the Celebrex [Dr. Harrison never said it was prescribed by Dr. Lo], that Dr. Seago prescribe the Celebrex [Dr. Harrison never said otherwise] and informing Dr. Harrison that the medical necessity and industrial causation needed to be clarified and that a panel QME was in process to address these issues. [Applicant's Exhibit 57].

There is no evidence as to when the RFA was received by Defendant. I have no way to determine if this letter questioning the medical necessity and raising the "body part" dispute is timely.

Applicant was then seen by Dr. Harrison again on 11/21/22. At that time, Dr. Harrison issued a new report and notes that there will again be a request for a cardiology consultation prior to beginning Celebrex. [Applicant's Exhibit 77] I do not see a new RFA in connection with this report.

Applicant is again seen by Dr. Harrison who issues another "new request" RFA on 01/12/23 for a cardiology consult. [Defendant's Exhibit W] Defendant again responds that the cardiology consultation is on delay pending the QME exam and report, with the QME exam set for 03/03/23. [Defendant's Exhibit X].

Applicant was admitted to Good Samaritan Hospital on or about 01/16/23 and discharged 01/23/23. The hospital records note that Mrs. Huitron is "demanding" Applicant see a cardiologist but the hospital maintains there are no cardiac issues. The records note that medical personnel were happy to make an outside referral so that Applicant could obtain said evaluation, but that there were no acute cardiac issues which would warrant an in-patient evaluation. There was no RFA in relation to any cardiac evaluation stemming from this hospitalization. [Defendant's Exhibit JJ]

The cardiovascular QME with Dr. Schmitz was eventually undertaken and a report issued dated 04/14/23. Dr. Schmitz makes several references to not having received certain medical records, including the 09/02/2014 surgical records, any neurology records after referral by Dr. Cahn [unclear if any actually exist], the hospital discharge records from the 08/19/21 hospitalization, the results of the echocardiogram and Lexiscan stress tests ordered by Dr. Cahn on 02/25/22 [unclear if these records actually exist], or the results of the echocardiogram from the 07/06/22 hospitalization. **There is no mention by QME Dr. Schmitz of whether or not Applicant should take the Celebrex recommended and prescribed by Dr. Seago.** So the question which had been pending which resulted in the need to access a cardiologist does not appear to ever have been asked of the QME. [Defendant's Exhibit II]

The testimony as to the cardiologist evaluation reveals that Applicant did undergo cardiac workup at Good Samaritan Hospital and El Camino Hospital, in January, 2023. There was no evidence of any acute cardiac issues during either hospitalization.

Claims examiner Ms. Young testified that Dr. Lo made a request for a cardiology consultation because of the medication, but the medication had been prescribed one year prior and never refilled so it was clear to her it was not being taken. This is incorrect. Dr. Lo made his request in July 2022. The prescription for the Celebrex was first made by Dr. Seago 6/9/22 per RFA. There is no evidence in the record that Dr. Lo ever asked for a cardiology consultation – there is no RFA from Dr. Lo for cardiology. Ms. Young testified that she sent a letter to Dr. Lo asking for more information as to the relationship between the medication and the referral. There is no such letter in evidence.

Testimony further shows that Defendant did in fact provide authorization for the cardiology referral and this was done sometime between day two of trial (05/02/23) and day three of trial (06/22/23). The authorization was for Applicant to be seen by Dr. Shenasa as originally requested by Dr. Harrison on 04/22/22. According to Ms. Young, the cardiology exam did occur but when she called the doctor's office for the report and billing, the doctor's office refused to provide it to her. Mrs. Huitron testified that Applicant "self-procured" the examination with Dr. Shenasa and that she has not served it on Defendant.

So. The issue is entitlement to medical treatment. Specifically the cardiology evaluation as originally requested by Dr. Harrison 04/22/22 and again on 08/08/22. The initial request was defective and timely addressed by Defendant, requesting more information. It was not provided. A conditional denial issued 04/25/22. An additional request was made 08/08/22 by Dr. Harrison and as noted, I have no information as to when it issued to Defendant or when Defendant received it. There is communication from Defendant 09/01/22 that medical necessity is at issue and needs to be addressed by a QME. A QME was eventually conducted with Dr. Schmitz who has found, on a preliminary basis as not all records were received and therefore the report is incomplete, that there is no cardiac injury. However, the pressing question of whether it was medically acceptable for Applicant to take Celebrex was apparently either never asked of Dr. Schmitz or never addressed by Dr. Schmitz and therefore the ONE question we needed answered remains unanswered. In the interim, Defendant has authorized the evaluation as originally requested and the evaluation has occurred. It would appear that the issue is therefore moot.

I will not address whether there was delay or bad faith or if penalties or sanctions might be appropriate given how these issues were handled, as those issues have been specifically deferred.

Addressing Applicant's contentions/summary:

Applicant has demanded a cardiology consult. As per above, Dr. Harrison issued an RFA for a consult with Dr. Shenasa on 04/21/22 and although the RFA references attached office visit notes to substantiate the request, there was nothing attached addressing the need for the cardiology consult. Defendant properly and timely notified the doctor of the incomplete request. Dr. Harrison did communicate thereafter indicating the cardiology consult was in connection with expected surgery but there was no surgery request by any doctor pending much less need for surgical pre-op. There was however, a prescription for Celebrex from Dr. Seago, with a concern about whether Celebrex was indicated given prior heart complaints from Applicant. Then Dr. Harrison issued the subject RFA of 08/08/22 and the attached medical report indicates **"I advise cardiology consultation if surgery is approved, this should be part of a pre-op clearance."** [emphasis added] Again, there is no pending surgery so there is therefore no need for a cardiology consult. There were then additional RFAs renewing the request for cardiology consult which was responded to by Defendant with a delay notice pending a QME evaluation on cardiology.

In the interim, Applicant underwent a cardiology evaluation during his hospitalization in January, 2023. There was then a cardiovascular QME with Dr. Schmitz but NO ONE APPARENTLY ASKED DR. SCHMITZ THE ONE QUESTION APPLICANT NEEDED AN ANSWER TO AND THAT IS THE SAFETY OF THE CELEBREX PRESCRIPTION. This was precisely the question which had been pending for a year and no one inquired of the QME. **MORE IMPORTANTLY, between days two and three of trial, Defendant did provide authorization for the cardiology consult and Applicant was in fact seen by Dr. Shenasa.** The consultation has in fact occurred. That there is NOW a dispute as to whether that is an industrial consult or a self-procured consult, and who "owns" that report and the information contained therein is not before me. Applicant wanted a consult with Dr. Shenasa as prescribed by Dr. Harrison in his original April 2022 RFA and which was reiterated in his August 2022 RFA.

Applicant has had the consultation.

The issue is moot.

Applicant alleges in his Petition that a new issue came up at the trial on 06/22/23 which if the parties failed to resolve would then need to be heard. Counsel apparently is under the mistaken belief that the issue would be decided as an additional issue in the ongoing trial. I did not ever add an additional issue to be decided. Adding a totally new issue at trial is generally not permitted. We need notice. We need to figure out what exhibits if any will be offered to address that issue. Frankly, I don't know what efforts have been made to resolve the issue. The actual "rub" here is that Mrs. Huitron apparently decided that she would not share the reporting with Defendant. I am at a loss as to the thinking. This was a consultation Applicant had been demanding for an extended period, which went back and forth between the doctors as to whether it was needed due to surgery or due to the Celebrex; that was subject to delay pending the QME evaluation and then no one mentioned the issue to the QME; which was then finally authorized with Defendant sending the medicals etc. to Dr. Shenasa; and then Applicant appeared for the consult, but chose to "change" the nature of the visit to a "self-procured" visit. These developments occurred mid-trial and the "nuance" as to the "nature" of the evaluation is not before me. Applicant wanted a cardiology consult with Dr. Shenasa. The carrier authorized it. Applicant attended and obtained a report. There is nothing pending for me to decide as to this issue. The issue is moot.

IV.

RECOMMENDATION

The Petition for Reconsideration/Removal should be denied.

DATE: 12/07/2023

ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE