WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHANTEL SEVILLANO, *Applicant*

vs.

KORE 1 INC.; ATLANTIC SPECIALTY INSURANCE COMPANY, adjusted by INTACT INSURANCE SPECIALTY SOLUTIONS, *Defendants*

Adjudication Number: ADJ11380052

Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Order (F&O) issued on May 4, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a scheduling clerk on June 1, 2018, applicant sustained injury arising out of and in the course of employment to the head, neck, and upper back, and claims to have sustained injury to the brain, eyes, right shoulder, psyche, and in the form of nausea, headaches and insomnia; (2) the parties stipulated that applicant's primary treating physician (PTP) is Jacobo Chodakiewitz, M.D; (3) the WCJ has jurisdiction to address the PTP's request for treatment in the form of an outpatient rehabilitation program for balance and pain management because the utilization review (UR) determination denying the request was untimely; and (4) there is substantial evidence to support the request for the outpatient rehabilitation program in order to cure or relieve the effects of applicant's industrial injury.

The WCJ ordered the matter off calendar.

Defendant contends that the WCJ erroneously determined that the UR determination was untimely because (1) service of Dr. Chodakiewitz's December 2, 2021 request for treatment was defective; (2) the request was not submitted to the claims administrator; applicant's attorney's emailing of the request to defendant's attorney cannot serve as a substitute for proper service; and (4) defendant acted with reasonable diligence in responding to the request after receiving it. Defendant further contends that the WCJ erroneously determined that the request is supported by

substantial medical evidence and that new evidence supporting this contention should be admitted to augment the record.

We received Answer from applicant.[1]

We received a supplemental pleading from defendant labeled as an objection to the Answer.[2]

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our review of the record, we will deny the Petition.

FACTUAL BACKGROUND

In the Opinion on Decision, the WCJ states:

> [T]he PTP's medical report dated 11/17/2021 does contain the defendant's correct address and suite number as opposed to the RFA which does not. The front page also shows it was mailed to the defense attorney. . . .
> . . .
> As the UR determination was not timely, the undersigned has jurisdiction per *Dubon* to determine the medical issue involving the approximately 4-5 month long rehabilitation program for balance issues and pain management. The evidence shows that the UR determination to non-certify was clearly based on the cost of the program as the evidence showed that the applicant met the criteria for enrollment in such a program and the PQME testified that it would be beneficial for her. Moreover the UR doctor's indication that there was "no multidisciplinary evaluation done to help determine appropriateness and specific functional goals to be achieved in this type of tertiary level program" is nonsensical as that is part and parcel of the program itself. . . . The high cost of treatment does not in and of itself render the treatment unreasonable and unnecessary without more. The goal of medical treatment is to cure and relieve from the effects of the industrial injury. In this applicant's case, having been hit in the head with a tree branch and not at MMI 4 years post injury justifies an outpatient program of his type. Therefore, the

[1] The Petition was filed on May 18, 2022 and the Answer was filed on June 14, 2022. Labor Code section 5905 provides that an answer to a petition for reconsideration "may" be filed within 10 days after service of the petition. However, inasmuch as section 5905 does not prohibit the receipt and filing of answers after 10 days and we have found no such prohibition elsewhere, we accept the Answer.

[2] We do not accept defendant's supplemental pleading because defendant did not seek leave to file it as required by the WCAB Rule 10964, which provides as follows: "When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party." (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).)

evidence to support an outpatient rehabilitation program appears substantial and that this form of medical treatment is reasonable and necessary for the recovery of this applicant.
(Opinion on Decision, pp. 4-6.)

In the Report, the WCJ states:

The matter was tried without testimony with the issue revolving around the RFA dated 12/2/2021 that included an 11/17/2021 PTP report and accompanying request for a balance rehabilitation and pain management program on an outpatient basis.
. . .
The evidence that was introduced included the following:

1. Joint Ex. 1 – RFA dated 12/2/2021 and medical report of the PTP dated 11/17/21. (The RFA and report were also attached to Applicant's Ex. 3 - email to defense attorney). The PTP report dated 11/17/2021 was served on the first defense attorney, Tzevi Schwarzbaum, Esq. and the correct address is listed on the cover page for the carrier in that report. The PTP indicated that the applicant was attending PT with no change in her condition which sometimes got worse depending on the weather. The PTP requested a comprehensive rehabilitation program such as CNS, Casa Colina or equivalent for balance rehabilitation, pain management, dizziness and cephalgia.

2. Applicant's Ex. 2 – 1/10/22 emails between applicant's attorney and defense attorney, Tricia Pride, Esq. asking Ms. Pride, (a partner at the defense firm) for the name of the new handling attorney and Ms. Pride's response providing the name of the new handing attorney, Airin Sookasian, Esq. that same day. In addition, applicant's attorney advised Ms. Pride that a UR issue was involved.

3. Applicant's Ex. 3 – 1/10/2022 email from applicant's attorney to Ms. Sookasian (the attorney that Ms. Pride informed applicant's attorney to contact) and the second handling attorney was advised of the UR issue and the RFA and PTP report were attached to the email, i.e. Joint Ex 1 was attached.

4. Applicant's Ex. 4 – dated 3/4/22 Defendant's objection to the DOR acknowledging receipt of the RFA and that it was forwarded and denied by UR.

5. Joint Ex. 5 – 2/21/22 UR modified denial indicating that the request was received on 2/14/2022. The UR review of documents affirms the need for a follow up with the PTP based on "no change" in the applicant's condition but the request for a "comprehensive rehabilitation program to include balance rehabilitation and pain management between 11/7/2021 to 4/15/2022, while there was documentation to request authorization for a comprehensive rehabilitation program that included balance rehabilitation and pain management, there was no multidisciplinary evaluation done to help determine

appropriateness and specific functional goals to be achieved in this type of tertiary level program." The next page goes into further detail. The criteria for entry was delineated including, inter alia, off work for more than 3 months, known etiology for the pain, lack of response to physical therapy etc. The main drawback was the high cost. The request was denied.

6. Applicant's Ex. 6 – 2/10/21 deposition transcript of neurology QME, Dr. Natalia Ratiner, MD. The PQME testified that a multi-disciplinary approach at an outpatient facility would be beneficial to the applicant's recovery. (20:12 – 22:13). In their brief, applicant's attorney designated pages to review to support the request.

. . .

[T]he PTP's medical report dated 11/17/2021 did contain the carrier's correct address and suite number as opposed to the RFA which did not. The front page also shows it was mailed to the first defense attorney (Joint Ex. 1, p. 5) and stated "Request for Authorization". The medical report could have triggered UR as early as five days after service of the 11/17/2021 if the claims administrator had accepted this report pursuant to CCR 9792.9.1(2)(B) . . .

The 11/17/2021 PTP report demonstrated that the applicant, Chantel Sevillano, still has balance injuries after being hit in the head by a tree branch on 06/01/2018 and has not reached maximum medical improvement. Under the section "Head", the applicant was noted to have headaches, dizziness and balance problems; under the section labeled, "Eyes/Ears/Nose, the PTP noted balance problems; under the heading "Diagnostic Impressions", the PTP noted dizziness/vertigo, chronic headaches, concussion, cervical spine radiculopathy; and under "Discussion and Recommendations" recommended authorization for a rehabilitation program that includes balance rehabilitation and pain management at CNS, Casa Colina or its' equivalent (Joint Exhibit 1 at pp. 3, 4, 5 of the PTP report). . . . In their petition, defendant did not address the service of the PTP report itself on the carrier and the defense firm.

. . . Applicant introduced the 1/10/2022 email to the defense attorney's partner, Tricia Pride, Esq. the name of the new handling attorney. Ms. Pride was informed that the issue involved UR. There was no express or implied objection to the email by Ms. Pride or the subsequent attorney whose name was provided. Applicant's attorney followed up with the new defense attorney on that date and attached the RFA and PTP report. No evidence was presented at trial that either defense attorney one nor defense attorney two did not receive the RFA and/or report.

. . . CCR 10109 places an affirmative duty to conduct an investigation and act in good faith. . . . [J]ust as easily as the third defense attorney with the same defense firm put the request through UR a month or so later, so could the second defense attorney or the partner done so on 1/10/22 or the first attorney in November, 2021. Therefore, the UR decision was not deemed to have been conducted in a timely

fashion based upon the evidence presented. (See also*, Czech v, Bank of America* (2016) 81 CCC 856.)
. . .
The PTP report itself has the correct suite number of the carrier and was also served on the first defense attorney Tzevi Schwarzbaum, Esq. at the defense firm's address . . . as early as 11/22/2021.
(Report, pp. 2-6.)

DISCUSSION

In evaluating defendant's arguments that (1) service of Dr. Chodakiewitz's December 2, 2021 request for treatment was defective; (2) the request was not submitted to the claims administrator; (3) applicant's attorney's emailing of the request to defendant's attorney cannot serve as a substitute for proper service; and (4) defendant acted with reasonable diligence in responding to the request after receiving it, we observe that Labor Code section 4610[3] provides as follows:

(i) In determining whether to approve, modify, or deny requests by physicians prior to, retrospectively, or concurrent with the provisions of medical treatment services to employees, all of the following requirements shall be met:

(1) Except for treatment requests made pursuant to the formulary, prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five normal business days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician. . . .
(§ 4610(i)(1).)

(j)(1) Unless otherwise indicated in this section, a physician providing treatment under Section 4600 shall send any request for authorization for medical treatment, with supporting documentation, to the claims administrator for the employer, insurer, or other entity according to rules adopted by the administrative director . . .
Administrative Director Rule 9792.9.1(c)(2)(B) provides:

(c) Unless additional information is requested necessitating an extension under subdivision (f), the utilization review process shall meet the following timeframe requirements:

. . .
(2)
. . .

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

> (B) The claims administrator may accept a request for authorization for medical treatment that does not utilize the DWC Form RFA, provided that: (1) "Request for Authorization" is clearly written at the top of the first page of the document; (2) all requested medical services, goods, or items are listed on the first page; and (3) the request is accompanied by documentation substantiating the medical necessity for the requested treatment.

Under these authorities, an injured worker's treating physician may request authorization for treatment by either utilizing a DWC Form RFA or submitting documentation substantiating medical necessity for the treatment and writing "Request for Authorization" along with an itemization of the requested medical services on the first page. The former procedure imposes upon defendant section 46104610(i)(1)'s UR determination deadlines while the latter provides defendant notice that it "may accept" the request for UR. (§ 4610; Cal. Code Regs., tit, 8, § 9792.9.1(c)(2)(B).)

Here, as stated in the Report, the "PTP's medical report dated 11/17/2021 did contain the carrier's correct address and suite number as opposed to the RFA which did not . . . [and] [t]he front page [of the report]. . . shows it was mailed to the first defense attorney and stated 'Request for Authorization'." (Report, p. 4.) It is thus clear that the treatment request received by defendant and its attorney was not subject to section 4610's UR determination deadlines. It follows that defendant's arguments that it did not violate those deadlines because service of the December 2, 2021 request was defective, the request was not submitted to the claims administrator, and applicant's attorney did not effect substitute service have no bearing on our analysis.

Our analysis instead focuses on defendant's contention that it acted with reasonable diligence in responding to the request for treatment after receiving it. Here we observe that *Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227 [35 Cal.Comp.Cases 383] states:

> Upon notice or knowledge of a claimed industrial injury an employer has both the right and *duty to investigate the facts* in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he *take the initiative in providing benefits*. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the effects of the industrial injury.
> (*Ramirez*, *supra*, at p. 234 [Emphasis added].)

In *United States Cas. Co. v. Industrial Acc. Com*. (*Moynahan*) (1954) 122 Cal.App.2d 427, [19 Cal.Comp.Cases 8], the court similarly states:

> Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury. . . . The duty imposed upon an employer who has notice of an injury to an employee is not...the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of his obligation and the needs of the employee.
> (*Moynahan*, *supra*, at p. 435.)

In *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc*. (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) (*Neri Hernandez*), we reiterated that "when an employer receives other notice that home health care services may be needed or are being provided, an employer has a duty under section 4600 to investigate." (*Neri Hernandez*, *supra*, at p. 695; see also *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd*. (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566] (*Braewood Convalescent Hosp*.).)

We also observe that defendant has a regulatory duty to conduct a reasonable and good faith investigation to determine whether benefits are due. Specifically, Rule 10109 provides, in relevant part:

> (a) [A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.
>
> (b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.
>
> (1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information . . . The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.
>
> (2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.
>
> (c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.
> . . .

(e) Insurers, self-insured employers and third-party administrations shall deal fairly and in good faith with all claimants, including lien claimants.
(Cal. Code Regs., tit. 8, § 10109.)

This duty to perform a good faith investigation of an applicant's claim and provide benefits when due includes an obligation by defendant's attorney to transmit a copy of a request for treatment to the adjuster within a reasonable time when the request was received by the attorney and it is unclear whether it was received by the adjuster. (See *Czech v. Bank of Am*., (2016) 81 Cal.Comp.Cases 856.)

In this case, as stated in the Report, defendant's attorney received the November 17, 2021 report labeled as a "Request for Authorization" on November 22, 2021 and submitted it for UR on or about February 14, 2022. (Report, pp. 3, 6.) Since defendant's attorney did not submit a copy of the report to the adjuster (or UR provider) or otherwise take affirmative steps to investigate the treatment request for approximately two and a half months after receiving it, we conclude that the UR determination was untimely. As such, we are unable to discern error in the WCJ's finding that she has jurisdiction to determine the issue of whether the request for an outpatient rehabilitation program for balance and pain management is reasonably necessary. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298, 1300 (Appeals Board en banc) (*Dubon II*).)

Turning to defendant's contention that the WCJ erroneously determined that the request for the outpatient rehabilitation program for balance and pain management is supported by substantial medical evidence, we agree with the WCJ's reasoning, as stated in Opinion on Decision and the Report, that the record demonstrates that applicant has not reached maximum medical improvement and continues to experience chronic headaches, dizziness, vertigo, and balance problems; that applicant meets the criteria for enrollment in the program according to the PQME's testimony; and that treatment in the form of "a rehabilitation program that includes balance rehabilitation and pain management at CNS, Casa Colina or its equivalent" is therefore warranted (Report, pp. 4-5; Opinion on Decision, pp. 5-6.)

Moreover, we are unable to discern merit to defendant's contention that since the December 2, 2021 request seeks treatment at the "Center for Neuro Skills" and the November 17, 2021 request seeks "a rehabilitation program . . . at CNS, Casa Colina or its equivalent," the requests are inconsistent and thus "incomplete." (Petition, p. 7:13.) Notably, the December 2, 2021 request attached the November 17, 2021 request as substantiation therefor—and the record

lacks any suggestion that the treatment at the Center for Neuro Skills is anything other than the substantial equivalent of that provided CNS or Casa Colina.

Accordingly, we are unable to discern error in the WCJ's finding that the treatment requested is reasonable and necessary to cure or relieve applicant from her injury.

Having determined the merits of the Petition, we nevertheless address defendant's contention that "[n]ew material evidence" in the form of a May 2, 2022 IMR decision should be considered with respect to the issue of whether the treatment requested is reasonable and necessary. (Petition, p. 7:18.)

In this regard, we observe that section 5906 provides, in pertinent part:

> Upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge *on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence*.
> (§ 5903 [Emphasis added].)

We have evaluated the evidence previously admitted by the WCJ and determined the merits of the Petition without concluding that further development of the record is needed. Accordingly, we decline to augment the record so that we may consider the May 2, 2022 IMR decision.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact and Order issued on May 4, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 18, 2022

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

CHANTEL SEVILLANO
KJT LAW
LEWIS BRISBOIS BISGAARD & SMITH

SRO/*pc*

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