WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOEL SALDANA, *Applicant*

vs.

ATHENS BAKING COMPANY, COMPWEST INSURANCE COMPANY, administered by COMPWEST, *Defendants*

Adjudication Numbers: ADJ6609212, ADJ6609179
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Orders issued by the workers' compensation administrative law judge (WCJ) in this matter on August 2, 2023. In that decision, the WCJ found in pertinent part that applicant, failed in his "affirmative duty to produce detailed records per Labor Code section "4307.8"[1] and the case of *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc*. (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) (*Neri Hernandez*), to produce detailed records showing services and dates rendered for the home health care services provided, and thus ordered that applicant take nothing further as reimbursement for such services.

The WCJ also ordered that the medical reporting and opinions of Kevin Calhoun, M.D. regarding applicant's need for homecare be submitted to Utilization Review (UR).

Applicant contends as follows:

> While Labor Code § 4603.2(b)(1) is the controlling law requiring itemization of services and charges to be submitted, when requesting payment for medical treatment services as a general rule, Labor Code § 4603.2(b)(1) may not be used by the WC Judge to deny compensation based on the lack of an itemized and contemporaneous description of the services rendered.

[1] The intended code section is section 5307.8, not 4307.8. Unless otherwise stated, all further statutory references are to the Labor Code.

> In the Roque Neri Hernandez v. Geneva Staffing, Inc. En Banc decision (2014) 79 Cal.Comp.Cases 682 the WCAB states that "Section 4603.2(b)(1) is not part of an injured worker's burden of proof under sections 4600(h) and 5307.8. Instead § 4603.2(b)(1) concerns payment.

Applicant also contends that there is no basis for the WCJ's finding that the reporting of Dr. Calhoun be submitted to UR.

Defendant filed an Answer to Petition for Reconsideration (Answer) requesting the Petition for Reconsideration be denied.

The WCJ who issued the Findings of Fact and Orders in this matter, subsequently retired after the issuance of his decision. As a result, the Presiding Judge filed a Report and Recommendation on Petition for Reconsideration (Report) pursuant to WCAB Rule 10962 (Cal. Code Regs, tit. 8, § 10962, recommending denial of the Petition for Reconsideration based upon the existing record.

We have reviewed the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report.

Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration, and we will order that this matter be referred to a WCJ at the Appeals Board for a status conference. Our order granting applicant's Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to section 5950 et seq.

I.

We also highlight the following legal principles that may be relevant to our review of this matter:

Here, we believe that based on our preliminary review that applicant proved that medical treatment, including in the form of home health care services, was reasonably required. (§ 4600(a)(h); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal. Comp. Cases 981]; *Dubon v. World Restoration, Inc.,* (2014) 79 Cal. Comp. Cases 313.) Applicant also proved that his need for medical treatment, including in the form of home health care services, was caused by his industrial injury. (§ 3600(a)(3); *McAllister v. Workmen's*

Comp. Appeals Bd. (1968) 69 Cal.2d 408, 417-418 [33 Cal.Comp.Cases 660]; *Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692 [58 Cal.Comp.Cases 313].) Accordingly, based on our preliminary review, we believe that applicant did meet his burden to show that home health care services were reasonable and necessary.

In *Neri Hernandez*, we summarized the impact of section 4600(h):

"Section 4600(h) makes clear that home health care services are included in the definition of 'medical treatment,' but it also limits an employer's duty to provide that treatment by imposing two additional conditions which are part of an injured worker's burden of proof. The first condition requires that home health care services be prescribed by a physician and the second condition requires that an employer's liability for home health care services is subject to either section 5307.1 or section 5307.8. When the type of services sought is not covered by an official medical fee schedule or Medicare schedule, section 5307.8 applies." (*Id.* at pp. 688-689.) Turning to the amount of services that applicant was and is entitled to, "an injured worker continues to bear the burden to demonstrate a reasonable hourly rate for the type of services provided and the number of reasonably required hours based on substantial evidence." (*Neri Hernandez, supra,* 79 Cal.Comp.Cases at p. 694.) Here, defendant has provided evidence that home health care services commenced on October 6, 2014.

However, in order to determine which services a defendant is actually liable for, an applicant must set forth the services performed, and explain which services occurred before, if any, and which occurred after the injury. Once an applicant or a provider under section 5307.8 is seeking payment, a defendant is entitled to receive the documentation specified in section 4603.2(b)(1) before issuing payment, including an itemization of services and charges, copies of all reports showing services performed, a prescription or referral by the primary treating physician, and any evidence of authorization. (*Neri Hernandez, supra,* at pp. 695-696.) However, we note that this documentation is not part of applicant's burden of proof required by section 4600(h); instead, section 4603.2(b)(1) describes documentation that a defendant may require before issuing payment.

In *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision), the Appeals Board held that an employer may not unilaterally cease to provide treatment authorized as reasonably required to cure or relieve the effects of industrial injury upon

an employee without substantial medical evidence of a change in the employee's circumstances or condition. The panel reasoned:

> Defendant acknowledged the reasonableness and necessity of [the medical treatment at issue] when it first authorized [that treatment], and applicant does not have the burden of proving [its] ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the [treatment] is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization [RFA] and starting the process over again.

In *Nat'l Cement Co., Inc. v Workers' Comp. Appeals Bd. (Rivota*) (2021) 86 Cal.Comp.Cases 595, the Second District Court of Appeal upheld the Appeals Board's application of *Patterson* to award an applicant continued inpatient care at Casa Colina, stating:

> [T]he principles advanced in [*Patterson*] apply to other medical treatment modalities as well. Here . . . Applicant had continued need for placement at Casa Colina. Further, [applicant's witness] stated that there was no change in Applicant's circumstance and no reasonable basis to discharge Applicant from care. The WCJ . . . concluded that Applicant's continued care at Casa Colina was necessary, without ongoing RFAs, to ensure Applicant's safety and provide him with a stable living situation and uninterrupted medical treatment.
> (*Rivota*, *supra*, at p. 597.)

In upholding this application of *Patterson*, the *Rivota* court rejected the employer's attempt to distinguish it on the grounds that it had never authorized inpatient care for an unlimited or ongoing period, never relinquished its right to conduct UR, and never been subject to a finding that inpatient treatment was reasonable and necessary for the applicant under section 4600. (*Id*.)

Here, there is no explanation in the record as to why UR applies, and we cannot determine whether there is any basis for the finding that Dr. Calhoun's reporting must be submitted to UR.

II.

It is well established that decisions by the Appeals Board must be supported by substantial 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].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp.*

Appeals Bd (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).) Here, although the parties proceeded to the first day of trial on August 2, 2022, there are no stipulations and issues identified in the Minutes of Hearing/Summary of Evidence (MOH) and there are no stipulations and issues identified in the MOH on the next day of trial on August 24, 2022. On December 27, 2022, the WCJ ordered defendant to produce documentation regarding sums paid to applicant and applicant was to produce "clarifying documentation about medical basis for claims, including caselaw supporting retroactive reimbursements." On August 2, 2023, the WCJ issued the F&O, without ever going on the record to identify the stipulations and issues. Thus, at a minimum, this matter will require return to the trial level for creation of a record.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Section 5310 states in relevant part that: "The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or

advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (See also Lab. Code, §§ 123.7, 5309.)

Here, it is unclear from our preliminary review whether the legal issues have been properly identified; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary. Thus, we will order the matter to a status conference before a WCJ at the Appeals Board.

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*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]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, 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"].)

Section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, order that this matter be set for a status conference, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued on August 2, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge at the Appeals Board. Notice of date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 23, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.
JOEL SALDANA
LOS ANGELES LAWYER, PC
SAPRA & NAVARRA

LAS/AS/*ara*

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