

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

BRUCE KELLY, *Applicant*

vs.

**COMMUNICATION TECHNOLOGY SERVICES LLC and
MASSACHUSETTS BAY INSURANCE COMPANY, administered by
THE HANOVER INSURANCE GROUP, *Defendants***

Adjudication Number: ADJ11998537

Van Nuys District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on June 9, 2023, wherein the WCJ found in pertinent part that due to lack of proper service to applicant's attorney, the June 10, 2022 Utilization Review (non-certification) was not timely; that in-patient neuro rehabilitation was reasonable and necessary to cure or relieve the effects of the industrial injury; and that applicant was entitled to Nurse Case Manager services.

Defendant contends that applicant did not meet his burden of proof in that the evidence submitted at trial does not support the award of the in-patient medical treatment nor the award of Nurse Case Manager services.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his head, brain, eyes, ears, jaw/TMJ (temporomandibular joint), psyche, cervical spine, both shoulders, lumbar spine, and both knees, while employed by defendant as a wire and cable installer on January 24, 2019.

Applicant underwent an extensive course of treatment. (See e.g., App. Exh. 21, Andrew Schreiber, M.D., January 26, 2022, pp. 20 – 74, medical record review [pp. 3 - 7 and 9 – 10 are not included in the exhibit].) His treatment included being evaluated by neuropsychologist Marcel Ponton, Ph.D., on September 9, 2020. (App. Exh. 23, Marcel Ponton Ph.D., October 16, 2020.) Dr. Ponton noted that applicant’s “subjective complaints” included positional dizziness, balance difficulties, speech problems, diplopia (double vision), irritability, social withdrawal, decreased concentration, word finding difficulties, decreased reading comprehension, and decreased mental agility. (App. Exh. 23, pp. 3 – 4.) The diagnoses included:

- Diffuse traumatic brain injury with loss of consciousness.
- Postconcussional syndrome
- Mild neurocognitive impairment.
- Personality change due to traumatic brain injury.
- Mood Disorder due to traumatic brain injury, with depressive features.
- Pseudobulbar affect [episodes of sudden uncontrollable and inappropriate laughing or crying]
- Post-traumatic stress disorder, chronic.
- Chronic Pain syndrome
- Vertiginous syndrome due to traumatic brain injury.[sensations that the individual and/or the surrounding environment are moving or spinning]

(App. Exh. 23, October 16, 2020, p. 42.)

On January 26, 2022, applicant was evaluated by neurology qualified medical examiner (QME) Andrew Schreiber, M.D. After examining applicant, taking a history, and reviewing the medical record, Dr. Schreiber concluded that:

From a neurological standpoint, the patient is restricted from working above ground level and on uneven surfaces. Because of difficulties with thinking and memory, it is my opinion that the patient is unable to perform any gainful employment. ... ¶ The patient shall continue to require close follow-up with neurology and psychiatry because of his headaches, difficulties with executive function, and mood. He would continue to require his medications as currently prescribed on an indefinite basis. (App. Exh. 21, pp. 79 – 80.)

Subsequently, in a treating physician progress note, Marline Sangnil, M.D., stated:

There has been a change in patient's care status. He was receiving assistance from his elderly neighbor for ADLs and iADLs [instrumental activities of daily living], but his neighbor is no longer able to provide care due to decline in health. Patient's risk factors relate to his TBI and multiple sequelae including functional and cognitive impairments. He has been forgetful with medications and appointments, disorientation and mental lapses during daily walks, and difficulty completing ADLs with meal prep, laundry, and cleaning related to weakness in his hand grip, and displays poor safety awareness. His dizziness, impaired memory, vestibular dysfunction, anxiety, blurry vision, gait imbalance, migraine headaches, and insomnia has created an unsafe living. Patient has already had multiple falls and several leading to head traumas. ¶ ...

A nurse case manager was assigned to him briefly, then was discontinued. He continues to require extensive assistance in organizing his medical care through Worker's Compensation due to his cognitive and memory deficits from his injury. We continue to strongly recommend this service, as it is required in order for him to obtain appropriate and necessary medical care. ... ¶ Patient is at risk for personal endangerment by living alone in his apartment without any assistance or supervision. Further injuries to his brain would place more adverse forces on the fragile recovery of his brain. Due to all of the above, patient would benefit from supervision and continued therapy sessions. He would also need transportation due to his blurry vision and vestibular impairment.

(App. Exh. 19, Marline Sangnil, M.D., (reviewed/signed by David Patterson, M.D.), May 18, 2022, pp. 3 and 4.)

The parties litigated various issues, having attended six trials during the period from August 10, 2022, through November 10, 2022. The parties again proceeded to trial on March 27, 2023. They revised the former stipulations and issues to include the stipulation that, “The June 10, 2022, Utilization Review is invalid due to lack of service on Applicant's Attorney” and the issues submitted for decision were:

1. Whether inpatient neuro rehab is reasonable and necessary to cure or relieve the effects of the industrial injury.
 2. Whether the Applicant is entitled to Nurse Case Manager services ...
- (Minutes of Hearing and Summary of Evidence, (MOH/SOE) March 27, 2023, pp. 2 - 3.)

DISCUSSION

Regarding the issue of the inpatient medical treatment, as noted above, Dr. Sangnil, stated that applicant's dizziness, impaired memory, vestibular dysfunction, anxiety, blurry vision, gait imbalance, migraine headaches, and insomnia had constituted unsafe living conditions and that applicant already had multiple falls with several leading to head traumas. (App. Exh. 19, p. 3.) We also note that in her Opinion on Decision, the WCJ stated that Dr. Sangnil's discussion of applicant's condition was consistent with "applicant's presentation, mood, affect, and testimony at trial" and that "applicant credibly testified he previously had significant benefit from inpatient residential programs" indicating that "if not for the earlier treatment, his present functioning level would be considerably worse." (F&O, p. 5, Opinion on Decision.) It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) Thus, we agree with the WCJ's conclusion that "applicant has met the burden to prove inpatient neuro rehab is reasonable and necessary to cure or relieve the effects of the industrial injury." (F&O, p. 6, Opinion on Decision.)

As to the issue of applicant's need for a nurse case manager, we first note that the provision of a nurse case manager is a form of medical treatment. (See e.g., *Patterson v. The Oaks Farm*, (2014) 79 Cal.Comp.Cases 910, 916 (Significant Panel Decision).)¹ Dr. Sangnil, stated that although a nurse case manager had previously been assigned but was discontinued, applicant "continues to require extensive assistance in organizing his medical care" and due to his cognitive and memory deficits caused by his injury, she continued to strongly recommend that applicant receive nurse case manager services. (App. Exh. 19, p. 4.) In her Report. the WCJ explained that the nurse case managers testified they "terminated their services because they felt their specific services were not making an impact.... As per the Opinion on Decision, the medical evidence, and applicant's testimony, proves there has been a deterioration in his condition. Mr. Kelly is thereby entitled to resumption of Nurse Case Management services." (Report, p. 4.) The WCJ's conclusion

¹ Although panel decisions of the Appeals Board are not binding precedent and have no stare decisis effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. (*Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 537, fn. 2 [65 Cal.Comp.Cases 277]; *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147]; *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en banc].)

that applicant is in need of nurse case manager services is consistent with the medical opinions stated by Dr. Sangnil and approved by Dr. Patterson. (App. Exh. 19, p. 4.) Again, we agree with the WCJ, and we see no legal or factual basis for disturbing her F&O.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on June 9, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 29, 2023

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

**BRUCE KELLY
ODJAGHIAN LAW GROUP
BRADFORD & BARTHEL, LLP**

TLH/mc

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

**REPORT AND RECOMMENDATION ON DEFENDANT'S
PETITION FOR RECONSIDERATION**

I.

INTRODUCTION

1. Applicant's Occupation: Installer
Date of Injury: 1/24/2019
Parts of Body Injured: left shoulder; head, brain, eyes, jaw,
TMJ, psyche
2. Identity of Petitioner: **Defendant** filed the Petition.
Timeliness: The Petition is timely filed.

Verification: The Petition is verified.
3. Date of Findings of Fact: 06/09/2023
4. Petitioner's contentions:
 - (a) The evidence does not justify the findings of fact;
 - (b) The findings of fact do not support the order, decision, or award;
 - (c) The trial judge acted in excess of its jurisdiction;

II.

BACKGROUND

Bruce Kelly sustained an admitted injury traumatic brain injury January 24, 2019, while employed as an Installer at Woodland Hills, California, by Communication Technology Services, LLC, when he fell from a ladder. Defendants have admitted the left shoulder, head, brain, eyes, jaw, TMJ, and psyche.

Litigation commenced as an Expedited Hearing, when applicant's attorney filed a Declaration of Readiness to Proceed July 7, 2022. Because of the multiple exhibits, extensive testimony, and numerous issues raised, the Expedited Trial was converted to a regular trial. Trial was on the record for six hearings, between August 10, 2022 to November 10, 2022.

The primary issues for were injury AOE/COE of orthopedic body parts per the panel QME; authorization of treatment stemming from a Utilization Review denial; and the need for continued/ongoing Nurse Case Management services. The undersigned WCJ issued Findings of Fact and Award/Order, and Opinion on Decision, dated February 2, 2023. Upon filing of a Petition for Reconsideration, the Findings and Award/Order was vacated, and the case set for further proceedings.

At the subsequent hearing of March 27, 2023, the parties resubmitted the same issues, though omitting parts of body injured AOE/COE as an issue. The undersigned then issued Findings and Order and Opinion on Decision dated June 9, 2023, and it is from this defendant[s] now seek[s] relief.

III.

DISCUSSION

ARGUMENT I: APPLICANT FAILED TO MEET HIS BURDEN OF PROOF ON ENTITLEMENT TO MEDICAL TREATMENT BECAUSE THE DISPUTED TREATMENT IS NOT SUPPORTED BY THE MTUS

Defendant[’s] argue[s] the MTUS treatment guidelines do not support an inpatient brain rehabilitation program for a patient who has a chronic injury, but whose cognitive deficits are mild, as opposed to severe. Defendant states: "Here, the WCJ cited the exact same language from the MTUS to award medical treatment as was relied upon by Medata to find the treatment unnecessary. Aside from highlighting, once again, the reasons laypersons should not be making medical decisions, it begs the question of how two different outcomes could be reached from reading the same language." This is in reference to the undersigned's Opinion on Decision, pages 4 - 5 which reads as follows:

"In conjunction with the exhibits entered into evidence, and the testimony taken, The Court refers to the MTUS Guidelines, Traumatic Brain Injury, effective November 15, 2017, as found on the DIR website, at page 210, "Inpatient: Comprehensive Integrated Interdisciplinary Rehabilitation" which provides the following indication for treatment:"

"Sufficient residual symptoms and/or signs of mostly acute TBI to necessitate ongoing and daily treatment, be it medical, physical therapy, occupational therapy, or other. Most programs are multidisciplinary and generally TBI inpatients are sufficiently severely affected to require multidisciplinary services. Most patients will have incurred severe TBI, but occasionally, patients with moderate TBI may also be benefited by these programs. Generally not used for chronic patients unless the TBI was severe and the patient is making functional gains not possible or substantially less likely in an outpatient setting."

This same language is used in the Medata UR denial June 10, 2022, as the criteria and guidelines applied supporting its denial of the requested treatment. The reviewer states Mr. Kelly has not benefitted from any brain injury program since the date of injury, and therefore, there is a lack of documentation of significant and sustained positive benefit toward objective and functional goals as a result of prior residential programs."

In contrast to defendant's argument, The Opinion on Decision finds there *has* been a change in the applicant's condition, explaining why The Court cites the same MTUS Guidelines as the relied on by Medata, despite the company finding the treatment unnecessary. As indicated in the Opinion on Decision, Dr. Sangil concluded, "There has been change in patient's care status... He has been forgetful with medications and appointments, disorientation, and mental lapses during daily walks and difficulty completing ADLs with meal prep, laundry. His dizziness, impaired memory... gait imbalance has created an unsafe living." This is consistent with how the applicant presented at trial, when testifying. His cognitive deficits are, in fact, severe.

Accordingly, the applicant met his burden to prove in-patient neuro rehab is reasonably and necessary to cure or relieve the effects of the industrial injury.

ARGUMENT II: TREATMENT IN THE FORM OF NURSE CASE MANAGER SERVICES IS CONTRARY TO THE EVIDENCE

Defendants cite the testimony of the two Nurse Case Managers who presented at Trial, Nurses Carrillo and Tan, noting both terminated services provided to Mr. Kelly on their own accord. This was also elucidated in the Opinion on Decision: "Both Grace Carrillo and Ruel Tan made it clear in their testimony that a Nurse Case Manager can unilaterally terminate services if the NCM believes they are not making an impact."

Defendants argue that[,] "applicant's counsel never voiced any objection to nurse Carillo when she terminated services, arguably waiving any right to do so now," though as indicated, the timeline of applicant's care and services has not been clearly established, and Mr. Kelly has had nurse case manager and home care services subsequent to the services provided by those who testified at trial. Therefore, it may not have been relevant for counsel to object, as another service provider was likely then brought in to provide care, in some capacity.

The Court disagrees with defendant's assertion that "none of the nurse case managers indicated a belief that further services were warranted," instead, the NCMs who testified terminated their services because they felt their specific services were not making an impact. In such a case, another nurse case manager was generally brought on to Mr. Kelly's case.

Specifically, then, nurse case management services were still warranted. As per the Opinion on Decision, the medical evidence, and applicant's testimony, proves there has been a deterioration in his condition. Mr. Kelly is thereby entitled to resumption of Nurse Case Management services.

Date: 07/13/2023

/s/ Jiblet Croft
JIBLET CROFT
Workers' Compensation Judge