WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRIS DERBOGHOSSIAN, *Applicant*

vs.

ALL TUNE & LUBE; ERIE INSURANCE COMPANY, administered by SOUTHLAND CLAIMS, *Defendants*

Adjudication Numbers: ADJ3107843 (MON 0208626)
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings and Award (F&A) issued on August 24, 2020, by the workers' compensation administrative law judge (WCJ). In the F&A, the WCJ found that defendant was liable for penalties and attorney's fees for delaying reimbursement of replacement security system cameras, which maintained a security system that defendant previously authorized and installed in applicant's home.

Defendant argues that the security system cameras were not a form of medical treatment and thus it was error to award attorney's fees under Labor Code[2], section 5814.5. Defendant further argues that it was not required to replace the cameras and that the WCJ erred in applying the holding in *Patterson* to the facts of this case. (*Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910.)

Applicant filed an Answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report"), wherein he recommended that reconsideration be denied.

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.
[2] All future references are to the Labor Code unless noted.

Based on our review of the record, the allegations of the Petition and the Answer and the contents of the Report, and for the reasons we will explain, as our Decision After Reconsideration, we will affirm the WCJ's decision.

FACTS

Applicant sustained an industrial injury on June 12, 1994 to his back, eyes, neck, internal systems, and psyche. (Minutes of Hearing, January 7, 2020, p. 2, lines 3-6.) This resulted in applicant sustaining permanent total disability. (Report, p. 2.)

In 2011, defendant reimbursed applicant for installing a security system in applicant's residence, which was done at the suggestion of applicant's treating doctor. (Minutes of Hearing, January 7, 2020, Stipulation of Fact #3, p. 2, lines 8-9; see also, exhibits 9, 12, 17.) In 2012, defendant reimbursed applicant for upgrades to the security system. (Exhibit 16.)

In 2019, applicant self-procured a new security system to replace the old security system. (Exhibit 13, Letter from Applicant's Counsel to Defense Counsel, January 17, 2019.) Thereafter he requested reimbursement from defendant for the cost of the replacement system. (*Ibid*.)

No request for authorization issued regarding the replacement security system. Defendant submitted a July 2019 medical report to utilization review notwithstanding that no RFA issued. (Defendant's Exhibit D.) UR denied the request for a security system. (*Ibid*.)

The matter initially proceeded to trial on the issue of whether the Appeals Board had jurisdiction under *Dubon II* to determine whether a replacement security system was reasonably and medically necessary. (Minutes of Hearing, January 7, 2020, p. 2, lines 14-15.) The WCJ thereafter took the matter off calendar so that the parties could depose the installer of the 2019 replacement security system. (Minutes of Hearing, March 2, 2020.) Although the installer's deposition transcript is not in evidence, the parties thereafter stipulated that the 2019 system was installed to replace the 2011 system. (Minutes of Hearing, May 21, 2020.) The matter was resubmitted on the issues of applicant's petition for penalties and attorney's fees. (*Ibid*.)

DISCUSSION

Section 5814 allows an award of penalties where payment of compensation is unreasonably delayed. (§ 5814.) In the en banc opinion of *Ramirez v. Drive Financial Services*, we discussed the remedial and penal aspects of section 5814 and outlined the following factors to consider in

determining whether and to what extent a penalty should be awarded. (73 Cal. Comp. Cases 1324, 1328-1330 (2008), (en banc).)

> (1) evidence of the amount of the payment delayed;
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> (2) evidence of the length of the delay;
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> (3) evidence of whether the delay was inadvertent and promptly corrected;
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> (4) evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error;
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> (5) evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that payment was to be made within a specified number of days;
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> (6) evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers' compensation insurance;
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> (7) evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable;
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> (8) evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it; and
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> (9) evidence of the effect of the delay on the injured employee.

(*Ibid*.)

Section 5814.5 states:

> When the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award by an employer that has secured the payment of compensation pursuant to Section 3700, the appeals board shall, in addition to increasing the order, decision, or award pursuant to Section 5814, award reasonable attorneys' fees incurred in enforcing the payment of compensation awarded.

(Lab. Code, § 5814.5.)

An industrially injured worker is entitled, at the employer's expense, to medical treatment that is reasonably required to cure or relieve the effects of the industrial injury. (Lab. Code, § 4600(a).) "The coverage of section 4600 extends to any medically related services that are reasonably required to cure or relieve the effects of the industrial injury, even if those services are not specifically enumerated in that section. (Citation.)" (*Patterson*, *supra* at 916 (citation omitted).)

Defenant primarily contends that the WCJ erred because the replacement security system did not constitute medical treatment. We disagree.

While ordinarily a home security system would not be considered medical treatment, when it is prescribed by a doctor to assist a patient who is both blind and suffers psychological injury, it becomes medical treatment. Defendant paid for the security system in 2011 in response to a request for authorization from applicant's treating physician. Whether the security system was reasonable and necessary medical treatment was decided in 2011, when defendant did not object to the request per section 4062.2 and instead paid for the system. Whether the security system is part of applicant's medical award is not at issue.

Once a piece of durable equipment is provided to applicant as a form of medical treatment, defendant is obligated to maintain the equipment. This is not application of *Patterson*; it is common sense. For example, if applicant requires a wheelchair on an industrial basis, defendant must maintain the wheelchair. To do otherwise improperly places an encumbrance upon applicant to maintain durable equipment.

Certainly, defendant could have disputed in 2011 whether the security system was reasonable and necessary medical treatment. Defendant was also free to dispute and investigate whether the security system needed replacement in 2019 and whether applicant continued to use the security system. Defendant investigated these latter issues. After its investigation, defendant stipulated that the replacement system was necessary. But this occurred after applicant's attorney intervened, after the matter proceeded to trial, and over a year after the request for reimbursement was made. Defendant received the request for reimbursement in January 2019. Six months later, defendant attempted to conduct utilization review on the issue of whether it was required to maintain the security system that it paid for. Only after trial, in 2020, did defendant depose the installer. It does not appear that defendant deposed applicant or called applicant as a witness.

Defendant's delayed investigation warranted both the penalties and attorney's fees awarded. (Cal. Code Regs., tit. 8, § 10109.)

To be clear, this case is distinct from *Patterson* as it involves durable medical equipment and not services. In *Patterson*, we held that an employer may not unilaterally terminate medical *services* when there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the worker from the effects of an injury. (See generally, *Patterson*, *supra*.) We have applied *Patterson* to various medical services including transportation services. (*Gunn v. San Diego Dept. of Social Services*, (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 414; *Ramirez v. Kuehne and Nagel*, (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 537; *Rabenau v. San Diego Imperial Counties Development Services Incorporated*, (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 97.)

The key to *Patterson* and its progeny is that those cases deal with services, which are intangible. Because services are intangible, we provided guidance as to how such services are to be continued until such time as defendant can prove the services are no longer necessary. Here, we are dealing with durable equipment, which is tangible. When it is tangible medical equipment, the analysis is much simpler: defendant must maintain it so long as applicant requires its use.

Defendant did not put forth a good-faith basis for its delay in reimbursing applicant for the replacement of the security system. Defendant had the opportunity to object in 2011 and litigate whether the security system was reasonable and necessary. Having failed to object in 2011, defendant may not raise an untimely objection in 2019 when the security system requires maintenance. Having reviewed the factors in *Ramirez* as applied to this case, the WCJ's award of penalties and attorney's fees was appropriate.

Accordingly, we affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on August 24, 2020, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 18, 2024

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

CHRIS DERBOGHOSSIAN
TROVILLION, INVEISS & DEMAKIS
WACHTEL LAW

EDL/oo

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