

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

JUAN GONZALEZ, *Applicant*

vs.

CROWN BUILDING MAINTENANCE, *Permissibly Self-Insured, Defendants*

**Adjudication Number: ADJ12129817
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

In the Findings of Fact of February 4, 2021, the workers' compensation judge (WCJ) found that applicant, while employed as a janitor on January 9, 2019, sustained an industrial injury consisting of a right inguinal hernia, that applicant is not entitled to further medical treatment to cure or relieve from the effects of the injury, and that Dr. Aubrey Swartz is not subject to replacement as the assigned Qualified Medical Evaluator (QME).

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the WCJ did not have jurisdiction to determine the issue of further medical treatment because it is subject to Utilization Review (UR) and Independent Medical Review (IMR). Applicant further contends that the WCJ erred in relying upon the medical opinion of Dr. Swartz because the doctor issued an untimely report.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude that a preponderance of evidence justifies the finding that applicant is entitled to further medical treatment to cure or relieve from the effects of the industrial injury. (Lab. Code, §§ 3202.5, 4600.) We will amend the

¹ Following the grant of reconsideration, Commissioner Katherine Williams Dodd became unavailable. Another commissioner was assigned in her place.

WCJ's decision accordingly, and we will return this matter to the trial level for further proceedings consistent with our opinion herein.

First we address applicant's contention that the WCJ erred in relying upon PQME Swartz's report dated October 11, 2019 because the doctor failed to issue the report within the 30 days allowed by DWC Regulation 38(a). (Cal. Code Regs., tit. 8, § 38(a).) To the extent applicant contends Dr. Swartz's report is inadmissible or should have been excluded by reason of its untimeliness, the contention is unpersuasive because the Minutes of Hearing of November 30, 2020 reflect that the report was admitted into evidence without objection. Further, applicant's petition for reconsideration only contends that the WCJ erred in relying upon Dr. Swartz's medical opinion; the petition does not take issue with the WCJ's finding that Dr. Swartz is not subject to replacement as the assigned QME. Therefore, objection to the latter finding is waived. (Lab. Code, § 5904.)

As for applicant's contention that the WCJ did not have jurisdiction to determine the issue of further medical treatment because it is subject to UR and IMR, the contention is misplaced because the general issue presented for the WCJ's determination at the hearing of November 30, 2020 was "future medical care," not the medical propriety of a particular treatment request made by a treating physician. Pursuant to Labor Code sections 4600 and 4604, the WCJ had authority to decide the issue of applicant's general right to "future medical care." (*Sanchez v. Enterprise Rent-A-Car* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 596 [The WCJ determined generally that applicant needed further medical treatment pursuant to section 4600; no issue was submitted regarding any specific medical treatment recommendation and the WCJ did not award any specific treatment, which is subject to sections 4610 and 4610.5].)

Nevertheless, we conclude that the WCJ's denial of further medical treatment is inconsistent with the preponderance of evidence in this case. The last treatment record is that of the treating surgeon, Dr. Leshner, who surgically repaired applicant's right inguinal hernia on March 29, 2019 and issued a post-operation report dated April 4, 2019. (Exhibit B.) The report is silent on the issue of follow-up medical treatment. Applicant testified at trial on November 30, 2020 that he saw Dr. Leshner about 10 to 14 days after the surgery, the apparent purpose of which was applicant's release from further *surgical* care. Otherwise, the record again is silent as to what further treatment may have been recommended by Dr. Leshner when he last saw applicant in April 2019. Although applicant testified he has not thought about scheduling a follow-up appointment

since then, he also testified that he still has painful symptoms from his right inguinal hernia repair, and he would like to see a doctor about it.

With the foregoing testimony in mind, we find that Dr. Swartz's report of October 11, 2019 acquires additional persuasive value on the question of further medical care. At the end of his report, Dr. Swartz remarked in conclusory fashion that no further treatment or diagnostic testing was indicated. However, this conclusion is contradicted by the doctor's narrative assessment of applicant's hernia symptoms. On page seven of his October 11, 2019 report, Dr. Swartz stated that "I do not see where he was examined for a left inguinal hernia at the different times he had been evaluated for his right inguinal hernia, in retrospect which would be a precautionary measure to see if there was a bilateral inguinal hernia occurring." In reference to applicant's complaints of a left inguinal hernia, Dr. Swartz further stated that "it would be reasonable that he does return to his surgeon, Dr. Leshner, for a reevaluation and particularly for his complaint of pain in the left inguinal region." We construe Dr. Swartz's statement that a *reevaluation* would be reasonable, *particularly* for applicant's left-side inguinal complaints, as a statement that the right inguinal hernia should be *reevaluated* in addition to an *initial* evaluation of applicant's complaints on the left side. Although Dr. Swartz also stated that applicant's left-sided inguinal pain "would not be considered related to this claim," the doctor is incorrect insofar as further medical treatment is concerned. As explained by our Supreme Court in *Granado v. Workers' Compensation Appeals Board* (1968) 69 Cal.2d 399, 405-406 [33 Cal.Comp.Cases 647], "[s]o long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself."

In summary, the record presented to us is less than ideal because the medical reporting is outdated. On balance, however, we are persuaded that the preponderance of evidence, consisting of applicant's trial testimony taken in conjunction with Dr. Swartz's medical report, justifies a finding that applicant is entitled to further medical treatment to cure or *relieve* the effects of the industrial injury. Applicant's general right to further treatment should be consistent with Dr. Swartz's recommendations as discussed above, i.e., follow-up evaluation of applicant's right inguinal hernia complaints by Dr. Leshner, which also should include Dr. Leshner's examination and assessment of applicant's left-sided symptoms. As applicant seems to acknowledge in his petition

for reconsideration, additional specific treatment requests made by Dr. Leshner will be subject to UR and IMR.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact of February 4, 2021 are **AFFIRMED**, except that the Sixth Finding of Fact is **AMENDED** to state as follows:

FINDINGS OF FACT

6. Applicant is entitled to further medical treatment to cure or relieve from the effects of the injury identified in Finding of Fact No. 1.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 22, 2021

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

**JUAN GONZALEZ
LAW OFFICES FOR THE INJURED WORKER
STANDER, REUBENS, THOMAS & KINSEY**

JTL/bea

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