

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

ARMANDO ZEPEDA, *Applicant*

vs.

**STARVIEW ADOLESCENT CENTER; QUALITY COMP, administered by ATHENS
ADMINSTRATORS, *Defendants***

**Adjudication Number: ADJ11438423
Marina del Rey District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.¹

Applicant and lien claimant Casa Colina seek reconsideration of the Findings and Order (F&O) issued on October 25, 2021, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) while employed as a teacher on July 30, 2018, applicant sustained injury arising out of and in the course of employment (AOE/COE) to his brain and head; (2) applicant failed to meet his burden of proving that *Patterson v. The Oaks Farms*, 79 Cal.Comp.Cases 910, applies to this matter; and (3) applicant's treatment requests must be in the form of requests for authorization (RFAs), which are subject to utilization review (UR) determinations and appealable only through independent medical review (IMR).

The WCJ ordered that (1) *Patterson, supra*, does not apply to this case; (2) applicant's RFAs are subject to the exclusive remedy of IMR; and (3) all other issues are moot.

Applicant contends that the WCJ erroneously failed to find that his February 18, 2021, March 17, 2021, April 22, 2021, and May 14, 2021 RFAs sought continued and ongoing inpatient treatment previously authorized by defendant which may not be subjected to UR without substantial medical evidence of a change in his circumstances or condition. Applicant further contends that the WCJ erroneously failed to determine the issue of whether defendant discontinued his inpatient care without an agreed upon safe discharge plan in violation of Labor Code Section

¹ Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

4610(i)(4)(C).² Applicant further contends that the WCJ violated the right to due process by failing to rule upon his motion to amend his witness list and otherwise failing to make a record of the reasons and grounds for the F&O.

Lien claimant contends that the WCJ erroneously determined that she lacks jurisdiction over the issue of whether defendant is required to provide the treatment sought by the RFAs because (1) defendant failed to present substantial medical evidence of a change in applicant's circumstances or condition; and (2) defendant authorized applicant to continue inpatient care through July 31, 2021, but failed to conduct UR of the RFAs requesting continued inpatient treatment thereafter.³

We received an Answer from defendant.

We received a supplemental pleading from defendant labeled as correspondence.⁴

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

We have considered the allegations of the Petitions, the Answer, and the contents of the Report. Based upon our review of the record, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant is entitled further medical treatment in form of continued inpatient treatment until such time as defendant may establish a change in his circumstances or condition warranting that it be discontinued and applicant's treating physician has agreed upon a care plan appropriate for his medical needs; and we will return this matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On September 21, 2021, the matter proceeded to trial as to the following issues:

² Unless otherwise stated, all further statutory references are to the Labor Code.

³ Lien claimant also seeks an order that defendant pay it for services rendered to date along with a penalty and interest. Because these issues were not raised for trial, we decline to address them here.

⁴ We do not accept defendant's correspondence as a supplemental pleading because defendant did not seek leave to file the pleadings 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).)

1. Whether Defendants may unilaterally cease to provide to cure or relieve the Applicant from the effects of the industrial injury residential care for a catastrophically injured Applicant when there is no documented change in the Applicant's circumstances or condition showing that the care is no longer reasonably required based on *Patterson v. The Oaks Farms*, 79 Cal. Comp. cases 910, 2014 Cal. Wrk. Comp. Lexis 98.
2. Defendant raises Labor Code Sections 4610 and 4610.5, IMR as the proper remedy.
3. Defendant raises reasonableness and necessity of treatment. The California MTUS does not support ongoing residential care. (Minutes of Hearing Expedited Hearing, September 21, 2021, p. 2:11-18.)

The parties stipulated that applicant's primary treating physician is Dr. David Patterson, M.D. (*Id.*, p. 2:7-8.)

The WCJ admitted exhibits entitled Request for Authorization from Dr. David Patterson dated 2/18/21, Request for Authorization from Dr. David Patterson dated 3/17/21, Request for Authorization from Dr. David Patterson dated 4/22/21, and Request for Authorization from Dr. David Patterson dated 5/14/21, into evidence. (*Id.*, p. 3:5-6.)

Marked as a "New Request," the form of Dr. Patterson's dated February 18, 2021 RFA requests the following:

Continue Casa Colina Transitional Living Center Interdisciplinary Post-Acute Residential Rehabilitation Program with 4-6 hours of therapy.
Continue stay from 03.01.2021 through 03.31.2021
(Ex. 12, RFA from David Patterson dated 2/18/21.)

Marked as a "New Request," the form of Dr. Patterson's March 17, 2021 RFA requests the following:

Continue Casa Colina Transitional Living Center Interdisciplinary Post-Acute Residential Rehabilitation Program with 4-6 hours of therapy.
Continue stay from 04.01.2021 through 07.31.2021
(Ex. 13, RFA from David Patterson dated 3/17/21.)

Marked as a "New Request," the form of Dr. Patterson's April 22, 2021 RFA requests the following:

Continue Casa Colina Transitional Living Center Inpatient Long Term Residential Program - Continue Stay from 05.01.2021 through 06.30.2021
(Ex. 14, RFA from David Patterson dated 4/22/21.)

Marked as a “New Request” for “Expedited Review” as “employee faces an imminent and serious threat to his or her health,” the form of Dr. Patterson’s May 14, 2021 RFA requests the following:

Continue Casa Colina Transitional Living Center Inpatient Long Term Residential Program - Continue Stay from 05.01.2021 through 06.30.2021 (Ex. 15, RFA from David Patterson dated 5/14/21.)

The May 14, 2021 is dated May 14, 2021, 11:00 a.m. (*Id.*)

The WCJ also admitted exhibits entitled UR Cert re Stay, June 26, 2020; UR Denial for Continued TLC Residential Program, February 23, 2021; UR Denial for Continuation of Residential Program dated March 18, 2021; David Patterson, M.D. Appeal Letter dated March 22, 2021; UR Appeal Mod-Cert Allowing Additional 30 Days Stay dated March 30, 2021; UR Non-Cert 61 Days dated April 23, 2021; UR Appeal Non-Cert dated April 28, 2021; RFA Denial dated May 17, 2021, and UR Non-Cert of Continued Stay dated June 17, 2021, into evidence. (Minutes of Hearing Expedited Hearing, September 21, 2021, p. 3:1-23.)

The June 26, 2020 UR certification states:

UR Determination

1. Recommend concurrent request for 30 days of transitional living center residential program to include PT, ST, OT and neuropsychology (up to 6 hours per day), 24-hour skilled nursing oversight and medication management between 6/4/2020 and 8/24/2020 be certified.

Clinical Rationale

The claimant sustained a traumatic brain injury after a fall. Treatment has included medication, physical therapy, diagnostic studies, and inpatient and outpatient rehabilitation. Per the progress report of 06/04/20 by Dr. Patterson, the claimant's subjective findings included history of traumatic brain injury after falling and hitting his head with loss of consciousness. He was evaluated by Dr. Ponton for having active suicidal ideation, and was diagnosed with major depression, chronic and severe posttraumatic stress disorder, and mild traumatic brain injury with concussion. Dr. Ponton was concerned that he was a high suicidal risk. He was admitted to Casa Colina as he has a known brain injury .

..

The guidelines state that residential transitional rehabilitation (ie, inpatient) treatment is provided under medical prescription by a psychiatrist, neurologist or other physician with brain injury experience. Patient able to benefit from intensive therapy (equal to or greater than 4 hours per day, 5 to 7 days per week), and at least one of the following: requires neurobehavioral treatment for moderate to severe deficits; demonstrates moderate to severe cognitive

dysfunction; requires treatment from multiple rehabilitation disciplines; medically complex, requiring physician or nursing interventions and up to 24 hours of nursing; will benefit from combination therapies; is unsafe; diagnosed with severe post-concussion syndrome; unable to feed orally; and family is unable to provide for the patient's level of care while participating in rehabilitation. The target length of stay (LOS) is up to 60 - 120 days for patients with moderate to severe injuries. The LOS for patients admitted to residential transitional rehabilitation for late rehabilitation may be longer, ranging between 180 to 240 days.

It would appear that the request for transitional living center does meet the guideline criteria. The claimant has a history of traumatic brain injury. He has previously had inpatient and outpatient rehabilitation. He was evaluated by Dr. Ponton on 06/01/20 who noted that the claimant had suicidal ideation with no current plans. The claimant was admitted on 06/04/20. The new and total number of days being authorized for an acute rehabilitation facility was apparently 30 days. If an additional stay is recommended, the provider should submit a new request by 06/26/20. Based on the aforementioned, the concurrent request for 30 days of transitional living center residential program to include PT, ST, OT and neuropsychology (up to 6 hours per day), 24-hour skilled nursing oversight and medication management is certified.
(Ex. T, UR Cert re Stay, June 26, 2020, pp. 1-2.)

The February 23, 2021 UR denial states:

Clinical Rationale

...

He was diagnosed with a traumatic brain injury, post-concussion syndrome, post-traumatic personality changes, depression, PTSD, anxiety, post-traumatic psychiatric manifestations, post-traumatic vision syndrome, migraine headaches, and cervicgia with likely C7-C8 radiculopathy. He had been treated with physical, occupational, and speech therapy, as well as an inpatient rehabilitation program, cognitive rehabilitation, and counseling. . . . The claimant's barriers to discharge included anger management, impulse control, and oversensitivity to interpersonal stimuli. He had continued death ideation which had increased. However, there had been improved participation in therapies. He had demonstrated increased endurance, as well as increased ability to problem solve and to concentrate. He had decreased headaches and increased activity tolerance.

...

Continuation of the residential transitional rehabilitation program is not indicated at this time. The claimant has made progress in the areas of speech, physical, and occupational therapy. Summary reports from each discipline have shown areas of progress and have defined continued deficits. The claimant had been authorized for a total of 148 days of an interdisciplinary post-acute residential rehabilitation program. Up to 120 days are recommended by the cited guidelines for those with moderate to

severe injuries. The claimant had exceeded the guideline recommendations by 28 days. The claimant had a mild TBI. The guidelines recommend up to 120 days for moderate to severe TBIs. . . . Based on this discussion, the concurrent request for continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily) for 31 days between 3/1/2021 and 3/31/2021 is non-certified. (Ex. BB, UR Denial for Continued TLC Residential Program, February 23, 2021, pp. 1-2.)

The February 23, 2021 UR denial contains a heading entitled Medical Records Reviewed, identifying records dated from August 7, 2018 through February 15, 2021. (*Id.*, p. 7.) The list identifies progress reports from Daniel Franc, M.D. dated June 7, 2019 and May 29, 2019, but not his PQME Neurology Report dated August 25, 2020. (*Id.*, pp. 7-8.)

The March 18, 2021 UR denial states:

Clinical Rationale

...

Although some mild psychological barriers were noted, records failed to document any significant functional or cognitive deficits that justified continued participation in the extensive multidisciplinary program. Recent reports showed very limited ongoing improvement, as progress appeared to plateau weeks ago. Previous requests for continued participation in the program were non-certified based on similar clinical observations, and no new clinical information was submitted to justify reintroduction of treatment. Therefore, the request for 122 day continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily) is non-certified.

(Ex. AA, UR Denial for Continuation of Residential Program, March 18, 2021, pp. 1-2.)

The March 18, 2021 UR denial contains a heading entitled Medical Records Reviewed, identifying records dated from August 7, 2018 through March 17, 2021. (*Id.*, p. 6.) The list identifies progress reports from Daniel Franc, M.D. dated June 7, 2019 and May 29, 2019, but not his PQME Neurology Report dated August 25, 2020. (*Id.*, pp. 6-7.)

The March 22, 2021 appeal letter from David Patterson, M.D., states:

I am not sure if you were provided the report of Dr. Daniel Franc, M.D., PQME Neurology dated 08.25.2020 however in that report he clearly outlines the diagnosis and symptomology of this unfortunate gentleman. As you are aware, the patient sustained head trauma, mood disorder NOS and chronic headaches. He went on to say that there is an important link between TBI and psychiatric disorders. Multiple research studies have demonstrated

a link between traumatic brain injury and psychiatric disorders including depression, anxiety, PTSD and psychotic disorders. The patient has been admitted to Casa Colina due to his TBI and neuropsychological/psychiatric disorders which are still ongoing today. Casa Colina's TBI program is a neurobehavioral program which is part of the TBI guidelines.

...

In this case, Mr. Zepeda's continues to require a structured supportive environment that recognizes TBI due to the condition and circumstance of his industrial injury. There has not been a change in his condition or circumstance and therefore I request that you reverse you non-certification and approve the patient for continued length of stay beginning 04.01.21-07.31.21 and continuing and continuing in accordance with the Patterson decision and the subsequent WCAB significant panel decisions that speak and support his continued length of stay.

(Ex. 17, David Patterson, M.D. Appeal Letter, March 22, 2021, pp. 1-2.)

The March 30, 2021 UR Appeal Mod-Cert Allowing Additional 30 Days Stay states:

UR Determination

1. Recommend concurrent request for 122 day continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily) has been modified to a certification of 30 day continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily) between 4/1/2021 and 7/31/2021.

...

Clinical Rationale

...

Based on the medical records, it appears that continued participation in the current transitional living center interdisciplinary post-acute residential rehabilitation is supported. The prior non-certification in review 5423797 was based on the fact that the records failed to document any significant functional or cognitive deficits that justified continued participation in the extensive multidisciplinary program. The provider, Dr. Patterson, submitted an appeal letter on 03/22/21, noting that the claimant continued to be affected by psychiatric disorder and psychological distress due to TBI and continued to have death ideation. Per the records, although, the claimant had 148 days of an interdisciplinary post-acute residential rehabilitation program which greatly exceed the recommended days of 120 days per guidelines, given that the claimant has reported a recent increase of psychological distress and death ideation, the some amount of the requested treatment is necessary to avoid unwanted complications in the future. Additionally, the claimant has reported benefits with the ongoing program. However, the requested additional 122 day continuation of transitional

living center interdisciplinary post-acute residential rehabilitation program is greatly excessive given that he already had 148 days of an interdisciplinary post-acute residential rehabilitation program and there was mild psychological distress documented. A 30 day continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily) is needed to properly assess and address the claimant's condition to avoid future unwanted situations and to provide a structured supportive environment for the claimant. . . . The claimant has spent approximately 148 days at the facility. The provider will need to submit a new request for additional stay 7 days prior to expiration of this certification. Therefore, the appeal request for 122 day continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily) is certified with modification to 30 day continuation of transitional living center interdisciplinary post-acute residential rehabilitation program to include PT, ST, OT and neuropsychology (4-6 hours of therapy daily). . . . (Ex. K, UR Appeal Mod-Cert Allowing Additional 30 Days Stay, March 30, 2021, pp. 1-3.)

The March 30, 2021 UR Appeal Mod-Cert Allowing Additional 30 Days Stay contains a heading entitled Medical Records Reviewed, identifying records dated from August 7, 2018 through March 22, 2021. (*Id.*, p. 7.) The list identifies progress reports from Daniel Franc, M.D. dated June 7, 2019 and May 29, 2019, but not his PQME Neurology Report dated August 25, 2020. (*Id.*)

The April 23, 2021 UR denial states:

At this time, it appears that additional days of a residential program are not indicated. It is appreciated that the claimant continues to have pain, functional deficits, and psychological complaints with noted improvement. Unfortunately, there is no evidence of measurable improvement in function. Also, the provider stated that the claimant has recently had an increase in unpleasant ideation. Without continued benefit, additional days are not warranted. He has completed up to 148 days of this program and was certified another 30 days in review 5427247 on 3/29/2021. Therefore, the request for 61-day Casa Colina transitional living center inpatient long-term residential program is non-certified. (Ex. J, UR Non-Cert 61 Days. April 23, 2021, p. 2.)

The April 23, 2021 UR denial contains a heading entitled Medical Records Reviewed, identifying records dated from August 7, 2018 through April 21, 2021. (*Id.*, p. 6.) The list

identifies progress reports from Daniel Franc, M.D. dated June 7, 2019 and May 29, 2019, but not his PQME Neurology Report dated August 25, 2020. (*Id.*, pp. 6-7.)

The April 28, 2021 UR appeal denial states:

Clinical Rationale

...

The fact that the claimant had significant issues from the injury is not in dispute. The provider notes benefit from the program but a review of records indicates there are not improvements and actual regression in terms of death ideation with at best an overall plateau. The guidelines support continuation based on the likelihood of achieving goals and discontinuation based on the inability to pass a rehabilitation plateau. The information here denotes that the claimant is not making progress and with the new 100% disability award, may need to be in a different setting. Therefore, the prior non-certification appears warranted. The request for 61 days casa colina transitional living center inpatient long term residential program is non-certified.

(Ex. I, UR Appeal Non-Cert, April 28, 2021, p. 2.)

The April 28, 2021 UR appeal denial states contains a heading entitled Medical Records Reviewed, identifying records dated from August 7, 2018 through April 21, 2021. (*Id.*, p. 6.) The list identifies progress reports from Daniel Franc, M.D. dated June 7, 2019 and May 29, 2019, but not his PQME Neurology Report dated August 25, 2020 or his PQME Re-Evaluation Report dated April 26, 2021. (*Id.*, pp. 6-7.)

The May 17, 2021 RFA denial states:

Prior non-certification for inpatient long term residential program at Casa Colina 5/1/21 through 6/30/21 issued 4/23/21 and the appeal was upheld on 4/28/21. The non-certification will remain in place for 12 months (Ex. G, RFA Denial, May 17, 2021, p. 2.)

The June 17, 2021 UR Non-Cert of Continued Casa Colina Stay June 17, 2021 states:

Specific Treatment Plan Requested

1 continued stay in the Casa Colina TLC Inpatient Long-Term Residential Program (7/1/2021-9/30/2021).

We are hereby notifying you that we are canceling this review:

...

Reason for the cancellation:

These services have previously been requested by this provider, and adverse determinations have been rendered. As there are no documented changes in the facts material to the basis of the utilization review decision(s), the previous adverse determination(s) remain in effect per 8CCR9792.9.1(h) (Ex. H, UR Non-Cert of Continued Casa Colina Stay, June 17, 2021.)

The July 23, 2021 UR Review withdrawal states:

Specific Treatment Plan Requested

1 continued stay in the Casa Colina TLC Inpatient Long-Term Residential Program (7/1/2021-9/30/2021).

We are hereby notifying you that we are canceling this review:

...

Reason for the cancellation:

These services have previously been requested by this provider, and adverse determinations have been rendered. As there are no documented changes in the facts material to the basis of the utilization review decision(s), the previous adverse determination(s) remain in effect per 8CCR9792.9.1(h) (Ex. A, UR Review Withdrawn, July 23, 2021.)

The WCJ also admitted exhibits entitled PQME Re-Evaluation Report of Daniel Franc M.D. dated April 26, 2021; and David Patterson, M.D. Report Pursuant to CCR 9792.1(C)(4) dated May 14, 2021, into evidence. (Minutes of Hearing Expedited Hearing, September 21, 2021, p. 3:1-23.)

The April 26, 2021 PQME Re-Evaluation Report states:

Subsequent to the date of injury, the patient has had ongoing pain and symptomatology.

...

He was readmitted to Casa Colina in June 2020, apparently related in large part due to suicidality secondary to his diagnoses of major depressive disorder, severe posttraumatic stress disorder, and mild traumatic brain injury with concussion.

His description of a ground-level fall leading to a documented scalp contusion, loss of consciousness, and neurologic symptoms occurring in developing over the subsequent hours in few days is consistent with the diagnosis of mild traumatic brain injury and concussion (McCrorry et al., 2013; Zhang et al., 2004).

He has been diagnosed with post concussive syndrome. In 10-15% of patients experiencing traumatic brain injury persistent symptoms beyond 3 months can occur (Tator et al., 2016). This postconcussional syndrome can be devastating for patients and affect cognitive and psychiatric functioning (Bramlett & Dalton Dietrich, 2015). The mainstay of treatment for postconcussional disorder is to treat individual symptoms including mood symptoms, headache, dizziness, and cognitive complaints.

This applicant reports deficits to attention and memory, and he has been evaluated by treating speech therapist to have "mild deficits in higher level" cognitive functioning. . . . **My recommendation is that this applicant**

undergo formal neurocognitive testing prior to the diagnosis of cognitive impairment secondary to traumatic brain injury.

...

Given the severity of his complaints of depression and ongoing suicidality, more aggressive psychiatric treatment such as transcranial magnetic stimulation, augmentation therapies with other medications, or other interventions may be considered by his treating psychiatrist. He apparently has been seen by a psychiatrist, Dr. Fox whose records are not available for review currently. I would recommend review of his ongoing psychiatric and psychological therapy. Moreover, I would recommend consideration of a psychiatric QME to clarify his psychiatric diagnosis and P&S status.

(Ex. F, PQME Re-Evaluation Report of Daniel Franc, M.D., April 26, 2021, pp. 52-53.)

The May 14, 2021 David Patterson, M.D. report states:

BRIEF REVIEW: . . . Patient was initially seen at Torrance Memorial Hospital and a CT of the head as supposedly negative for acute events. He was discharged home but later was admitted to the Center for neuro skills in Encino in December 2018 and then transferred to the Center for neuro skills in Bakersfield for ongoing rehabilitation due to his brain Injury. Patient was abruptly discharged due to an insurance decision he had eventually readmitted to the Center for Neuro skills after overdosing on Seroquel among other medications. Patient was evaluated by neuropsychologist Dr. Ponton on June 1, 2020 for active suicidal ideation. Patient signed a digital contract stating he would not harm himself, was diagnosed with acute major depressive event, chronic and severe posttraumatic stress disorder with mild traumatic brain injury and concussion and found to be a better candidate for acute inpatient rehabilitation rather than a 5150 hold. Majority of patients psychiatric changes are related directly to his industrial related brain injury which was amenable to acute inpatient rehabilitation at Casa Colina Hospital.

The patient continues to suffer from depression, anxiety and anger management issues related to his traumatic brain injury. Most recently he had a verbal outburst and aggression where property destruction occurred in the residence due to verbal exchanges between other patients. This is not the first time that this has occurred there the patient's perception is skewed by reality and he misinterprets what is occurring. This places him at risk in the home and community as well as other people around him. Therefore I am recommending that an expedited review of the RFA be performed pursuant to CCR 8792.9.1 (c)(4). Additionally, the patient does not have a safe discharge location as his family is afraid to accept him back in the home due to his behavior dyscontrol.

(Ex. 18, David Patterson, M.D. Report Pursuant to CCR 9792.1(C)(4), May 14, 2021.)

The May 14, 2021 David Patterson, M.D. Report is dated May 14, 2021, 11:06 a.m. (*Id.*)

At trial, applicant sought to call witness Jennifer Podska, and defendant objected on the grounds that the witness was not identified on the pretrial conference statement and defendant had not otherwise been informed about the witness until trial. (*Id.*, p. 5:6-20.)

In the Report, the WCJ states:

Casa Colina submitted Requests for Authorization (RFA) to the Defendant which have been submitted to Utilization Review (UR). Generally, these RFAs had been certified as medically necessary by the UR physician(s) and the Defendant has authorized the certified treatment.

A dispute arose however, over RFAs 02/18/2021 (Exhibit 12), 03/14/2021 (Exhibit 13), 04/22/2021 (Exhibit 14) and 05/14/2021 (Exhibit 15). Applicant asserted that these RFAs were not subject to Utilization Review (UR) and Casa Colina was not obligated to submit further RFAs. Additionally, the Defendant was prohibited from unilaterally terminating Applicant's treatment without meeting the burden of proof showing that there had been a change in the Applicant's condition that would render the treatment no longer reasonable and necessary per Patterson v. The Oaks Farms 79 Cal.Comp.Casesa (sic) 910, 2014 Cal.Wrk.Comp. Lexis 98."

...

On 09/21/2021, for the first time, Petitioner stated that she wished to call a witness to testify. This witness had not been previously disclosed. The Defendant objected to the testimony of this witness and after further discussion with the parties the Defendant's objection was sustained by this WCJ (the witness did not testify.)

...

Petitioner contends that this WCJ did not provide a ruling on her request to call witness Jennyfer Poduska. A formal written ruling on this issue was unfortunately omitted in the minute reflection on the Minutes of Hearing, Summary of Evidence. However, the dispute regarding this witness's testimony was outlined in the minute reflection and this WCJ verbally issued the order sustaining the Defendant's objection to the witness during the trial. Both parties acknowledged an understanding of this order and Ms. Poduska did not testify.
(Report, pp. 2-6.)

DISCUSSION

We turn first to petitioners' contention that the February 18, 2021, March 17, 2021, April 22, 2021, and May 14, 2021 RFAs sought to continue applicant's ongoing, previously authorized treatment which, as such, could not be subjected to additional UR without substantial medical evidence of a change in applicant's circumstances or condition.

In *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision),⁵ 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.
(*Patterson, supra*, at p. 918.)

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.*)

⁵ Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

In this case, as stated in the Report, applicant's physician, Dr. Patterson, submitted RFAs for continued inpatient treatment, defendant submitted the RFAs to UR, and the RFAs were "[g]enerally certified as medically necessary by the UR physician(s)" and authorized by defendant.⁶ (Report, p. 2.) The record also shows that the authorization for inpatient treatment was based in part on a determination that applicant "does meet the guideline criteria." (Ex. T, UR Cert re Stay, June 26, 2020, pp. 1-2.)

As to the disputed RFAs, the February 18, 2021 RFA sought to continue applicant's inpatient care from March 1, 2021 through March 31, 2021." (Ex. 12, RFA from David Patterson dated 2/18/21.) The denial noted applicant's progress in the areas of speech, physical, and occupational therapy; and that applicant had continued barriers to discharge, including anger management, impulse control, oversensitivity to interpersonal stimuli and increased death ideation. (Ex. BB, UR Denial for Continued TLC Residential Program, February 23, 2021, pp. 1-2.) The denial stated that applicant's treatment had exceeded by twenty-eight days the "target length of stay" set forth in the guidelines and indicated that it lacked the benefit of Dr. Franc's August 25, 2020 PQME Neurology Report. (*Id.*, pp. 1-2, 7-8; Ex. T, UR Cert re Stay, June 26, 2020, pp. 1-2.)

The March 17, 2021 RFA sought to continue applicant's inpatient care from April 1, 2021 through July 31, 2021. (Ex. 13, RFA from David Patterson dated 3/17/21.) The denial noted that applicant's improvement was very limited, that "no new clinical information was submitted to justify reintroduction of treatment," and otherwise relied upon the previous denial. (Ex. AA, UR Denial for Continuation of Residential Program, March 18, 2021, pp. 1-2.)

In his March 22, 2021 appeal of the March 18, 2021 denial, Dr. Patterson stated that Dr. Franc's August 25, 2020 PQME Neurology Report outlines applicant's diagnosis and symptomology and that applicant's inpatient treatment is "part of the TBI guidelines." (Ex. 17, David Patterson, M.D. Appeal Letter, March 22, 2021, p. 1.) He acknowledged that applicant had shown very little improvement and advised that the treatment sought was not a "reintroduction" but a continuation of ongoing treatment: "There has not been a change in his condition or

⁶ Defendant's answer states that applicant's RFA "dated September 17, 2020 requested a continued stay from October 1, 2020 through October 31, 2020" that was denied by UR dated September 26, 2020, raising an issue of whether the denial was untimely. (Answer, p. 4:12-15; see also Ex. Q, UR Non-Cert dated September 26, 2020, p. 1.) Because there is no dispute regarding the September 17, 2020 RFA, we do not address the issue of whether UR thereon was timely.

circumstance and therefore I request that you reverse you[r] non-certification and approve the patient for continued length of stay beginning 04.01.21-07.31.21.” (*Id.*, pp. 1-2.)

The March 30, 2021 appeal response determined that the “concurrent request for 122 day continuation” of inpatient treatment was modified and certified to authorize thirty days of inpatient care between April 1, 2021 and July 31, 2021.” (Ex. K, UR Appeal Mod-Cert Allowing Additional 30 Days Stay, March 30, 2021, p. 1.) It found that “continued participation in the current transitional living center interdisciplinary post-acute residential rehabilitation is supported,” notwithstanding it did not indicate that it had taken into account Dr. Franc’s August 25, 2020 PQME Neurology Report. (Ex. K, UR Appeal Mod-Cert Allowing Additional 30 Days Stay, March 30, 2021, pp. 3, 7.) However, it found that the requested additional 122 days of continued inpatient care was “greatly excessive.” (*Id.*)

The April 22, 2021 RFA sought to continue applicant’s inpatient care at from May 1, 2021 through June 30, 2021. (Ex. 14, RFA from David Patterson dated 4/22/21.) This request too was denied as excessive: “He has completed up to 148 days of this program and was certified another 30 days in review 5427247 on 3/29/2021.” (Ex. J, UR Non-Cert 61 Days. April 23, 2021, p. 2.) The response to applicant’s appeal also found that applicant “is not making progress” and suggested that “with the new 100% disability award, [he] may need to be in a different setting.”⁷ (Ex. I, UR Appeal Non-Cert, April 28, 2021, p. 2.) Neither the denial nor the appeal response indicated that it had accounted for Dr. Franc’s August 25, 2020 PQME Neurology Report, and the appeal response also did not indicate that it had accounted for his April 26, 2021 PQME Re-Evaluation Report. (Ex. J, UR Non-Cert 61 Days. April 23, 2021, pp. 2, 6-7; Ex. I, UR Appeal Non-Cert, April 28, 2021, pp. 2, 6-7.)

The May 14, 2021 RFA from applicant’s primary treating physician sought to continue inpatient care from May 1, 2021 through June 30, 2021 based upon “an imminent and serious threat” to applicant’s health, but the RFA was denied without medical UR based upon the results of the previous appeal, and subsequent RFAs were cancelled or withdrawn from UR for lack of “documented changes in the facts material to the basis of the utilization review decision(s), the previous adverse determination(s).” (Ex. 15, RFA from David Patterson dated 5/14/21; Ex. G,

⁷ We are unable to discern how applicant’s one hundred percent disability award may constitute medical or legal grounds for concluding that his inpatient treatment should be discontinued.

RFA Denial, May 17, 2021, p. 2; Ex. H, UR Non-Cert of Continued Casa Colina Stay, June 17, 2021; Ex. A, UR Review Withdrawn, July 23, 2021.)

On this record, it is clear that the February 18, 2021, March 17, 2021, April 22, 2021, and May 14, 2021 RFAs sought to continue applicant's ongoing, previously authorized treatment; and, therefore, are not subject to UR in the absence of substantial medical evidence of a change in applicant's circumstances or condition. However, rather than assert that applicant's circumstances and condition have changed, the RFA denials state that applicant's condition has not improved and that he has exceeded the guidelines' length of stay targets as a result.

Furthermore, the denial of the May 14, 2021 RFA based upon "an imminent and serious threat" to applicant's health was based upon the results of the previous appeal without UR—and the RFAs that followed were also denied without UR, notwithstanding that none of the UR decisions had accounted for Dr. Franc's PQME Neurology Evaluation Report, Dr. Franc's Re-Evaluation Report⁸, or Dr. Patterson's May 14, 2021 report stating that applicant was "at risk in the home and community as well as other people around him." Thus, the record otherwise lacks substantial medical evidence of a change in applicant's circumstances or condition warranting review or alteration of his treatment. (See *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93] (finding that decisions not based upon adequate medical history or examination are based upon surmise, speculation, conjecture or guess and do not constitute substantial medical evidence).)

Because applicant's safety and health have required him to submit concurrent RFAs to continue previously authorized inpatient treatment, and because the record lacks substantial medical evidence of a change in his circumstances or condition warranting discontinuation of the treatment, the situation before us falls squarely under *Rivota* and *Patterson*. Therefore, we conclude that the WCJ erroneously found *Patterson* inapplicable. Accordingly, we will rescind the F&O and substitute a finding that applicant is entitled to further medical treatment in form of continued inpatient treatment until such time as defendant may establish a change in his

⁸ We note that Dr. Franc's PQME Re-Evaluation Report explains that between ten and fifteen percent of patients experiencing traumatic brain injury have symptoms persist beyond three months, and symptoms, including suicidality, secondary to diagnoses of major depressive disorder, severe posttraumatic stress disorder, and mild traumatic brain injury with concussion that continue beyond three months require *continuing treatment and additional diagnostic interventions*. (Ex. F, PQME Re-Evaluation Report of Daniel Franc, M.D., April 26, 2021, pp. 52-53 [Emphasis added].)

circumstances or condition warranting that it be discontinued. (See *Patterson, supra*, at p. 918 (stating that terminating medical treatment earlier authorized as reasonably required to cure or relieve the injured worker from the effects of the industrial injury is contrary to section 4600(a) unless supported by substantial medical evidence).)

We next address petitioners' contention that the WCJ erroneously found that she lacks jurisdiction to determine the issue of whether defendant violated section 4610(i)(4)(C) by discontinuing applicant's inpatient care without having a safe discharge plan agreed upon by his primary treating physician.

Preliminarily, we note that the issue of whether section 4610 bars the WCJ from exercising jurisdiction over applicant's medical treatment was framed for trial herein; and, as such, the applicability of section 4610, including subsection (i)(4)(C), is at issue. Therefore, we conclude that the issue was not waived and was properly raised by petitioners. (Minutes of Hearing Expedited Hearing, September 21, 2021, p. 2:11-18.)

Section 4610(i) applies to RFAs of "concurrent" medical treatment, such as applicant's inpatient treatment here. (§ 4610; Cal. Code Regs., tit. 8, § 9792.6.1(c) ["Concurrent review" means utilization review conducted during an inpatient stay].) Under section 4610(i)(3), "concurrent" UR decisions, "shall be made in a timely fashion that is appropriate for the nature of the employee's condition, but not to exceed 72 hours after the receipt of the information reasonably necessary to make the determination." (See also Cal. Code Regs., tit. 8, § 9792.9.1(e)(3).)

Here, the record shows that the May 14, 2021 RFA was faxed to defendant on that date at 11:00 a.m., and that Dr. Patterson's accompanying report was faxed on that date at 11:06 a.m. (Ex. 15, RFA from David Patterson dated 5/14/21; Ex. 18, David Patterson, M.D. Report Pursuant to CCR 9792.1(C)(4), May 14, 2021.) The denial is dated three days later, May 17, 2021; but the record does not show what time it may have issued. (Ex. G, RFA Denial, May 17, 2021, p. 2.) The denial subjected applicant to the prospect of immediate discharge, placing him and the people around him at risk. (See Ex. K, UR Appeal Mod-Cert Allowing Additional 30 Days Stay, March 30, 2021, p. 1; Ex. 18, David Patterson, M.D. Report Pursuant to CCR 9792.1(C)(4), May 14, 2021.) Thus, we conclude that the May 17, 2021 denial was not issued in a timely fashion appropriate for applicant's condition.

In addition, applicant's May 14, 2021 RFA for expedited review of his request for continued inpatient treatment from May 1, 2021 through June 30, 2021 was denied based upon the April 2021 appeal decision without defendant conducting UR, and the RFAs for continued

inpatient treatment from July 1, 2021 through September 30, 2021 were withdrawn from UR without decision. (Ex. 15, RFA from David Patterson dated 5/14/21; Ex. G, RFA Denial, May 17, 2021, p. 2; Ex. H, UR Non-Cert of Continued Casa Colina Stay, June 17, 2021; Ex. A, UR Review Withdrawn, July 23, 2021.) It follows that that defendant failed to conduct UR for RFAs seeking continued inpatient treatment following applicant's treatment authorized until July 31, 2021. (Ex. K, UR Appeal Mod-Cert Allowing Additional 30 Days Stay, March 30, 2021.)

Because defendant did not issue a timely decision after receiving the May 14, 2021 RFA and failed to conduct UR with respect to the RFAs that followed, we are persuaded that the WCJ was authorized to determine the issue of what medical treatment is reasonably required to cure or relieve applicant from the effects of his injury. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.) (*Dubon*); see also *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313; *Bodam v. San Bernardino County/Department of Soc. Servs.* (2014) 79 Cal.Comp.Cases 1519, 1521 (significant panel decision).)

In this regard, section 4610(i)(4)(C), provides in pertinent part that, "in the case of concurrent review, medical care shall not be discontinued until the employee's physician has been notified of the decision and a care plan has been agreed upon by the physician that is appropriate for the medical needs of the employee."

The record here reveals that applicant "does not have a safe discharge location as his family is afraid to accept him back in the home due to his behavior dyscontrol." (Ex. 18, David Patterson, M.D. Report Pursuant to CCR 9792.1(C)(4), May 14, 2021.) Hence, applicant is entitled to continued inpatient treatment until a care plan has been agreed upon by his treating physician, Dr. Patterson. Accordingly, we will substitute a finding that applicant is entitled to continued inpatient treatment until his treating physician has agreed upon a care plan appropriate for his medical needs.

We next address applicant's contention that the WCJ violated his right to due process by failing to rule upon his motion to amend his witness list and otherwise failing to make a record of the reasons and grounds for the F&O.

Here, the Report states that the WCJ issued a verbal order denying the motion to amend, failed to make a record thereof, and that the proposed witness, Ms. Poduska, did not testify. (Report, p. 6.) In this regard, applicant contends that Ms. Poduska would have testified that the RFAs at issue herein sought continued inpatient treatment of limited duration based upon billing, not medical, requirements. But as we explained, defendant holds the burden of proving that a change of applicant's circumstances or condition warrants review of the issue of whether

continuing inpatient treatment is warranted. In other words, under *Patterson* and *Rivota*, applicant need not proffer evidence that he is entitled to continuing inpatient treatment unless and until defendant establishes a change in his circumstances or condition based upon substantial medical evidence. Since such a change has not been established, applicant was not required to prove what treatment may have been reasonably required to cure or relieve him from the effects of his industrial injury, or the duration of such treatment. Consequently, we are unable to discern how applicant may have been harmed by the WCJ's order denying his motion to amend his witness list to allow testimony as to the duration of his inpatient treatment. Accordingly, we conclude that applicant's contention that the WCJ violated his right of due process is without merit.

Accordingly, we will rescind the F&O and substitute findings that applicant is entitled further medical treatment in form of continued inpatient treatment until such time as defendant may establish a change in his circumstances or condition warranting that it be discontinued and applicant's treating physician has agreed upon a care plan appropriate for his medical needs; and we will return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on October 25, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Armando Zepeda, born [], while employed on 7/30/18, as a teacher, at Torrance, California, by Star View Adolescent Center, sustained injury arising out of and in the course of employment to the brain and head; all disputed body parts and/or AOE/COE issues are deferred.

2. Applicant is entitled to further medical treatment in the form of continued inpatient treatment provided by lien claimant Casa Colina until such time as defendant may establish a change in his circumstances or condition warranting that it be discontinued and applicant's treating physician has agreed upon a care plan appropriate for his medical needs.

IT IS FURTHER ORDERED that this matter is **RETURNED** for further proceedings consistent with this decision

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 20, 2022

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

**ARMANDO ZEPEDA
TINA ODJAGHIAN LAW GROUP
LAW OFFICES OF TAPPIN & ASSOCIATES
CASA COLINA HOSPITAL
CBE LAW GROUP**

SRO/pc

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