

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

ELAINE HOLGUIN, *Applicant*

vs.

**FIRST UNITED METHODIST CHURCH and GUIDEONE MUTUAL INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ2529637 (AHM 0145051)
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 7, 2022, wherein the WCJ found in pertinent part that utilization review was required for the September 13, 2021 Request For Authorization (RFA) from treating physician Scott Small D.O., that defendant did not submit the RFA for utilization review and denied the treatment requested, that Dr. Small documented a change of material facts in his September 13, 2021 report to support the RFA, and that the RFA is consistent with the Medical Treatment Utilization Schedule (MTUS); the WCJ awarded applicant the Functional Restoration Program requested by Dr. Small.

Defendant contends that over its objection, the September 13, 2021 RFA was first identified as an issue at the December 6, 2021 Mandatory Settlement Conference (MSC) so it should have been permitted to submit evidence addressing that issue; and that it "has discovered new evidence material to the 9/13/21 RFA which they could not, with reasonable diligence, have discovered and produced at the hearing." (Petition, p. 6.)

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the 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, and for the reasons discussed below, we will rescind the F&A and substitute a new Findings of Fact, finding that the September 13, 2021 report from

Dr. Small does not constitute substantial evidence in support of September 13, 2021 RFA; that Utilization Review of the September 13, 2021 RFA was not required; and that applicant is not entitled to undergo the Functional Restoration Program at defendant's expense.

BACKGROUND

Applicant claimed injury to her neck, back, shoulders, wrists, hips, and knees, while employed by defendant as a pre-school teacher on November 15, 2005. The injury claim was initially settled by Stipulations With Request for Award and subsequently by a Compromise and Release that included an "open" award of future medical treatment; a WCJ issued the Order Approving Compromise and Release on May 25, 2016.

Dr. Small issued a Request for Authorization for a Functional restoration Program, and a narrative report regarding the RFA, on August 27, 2021. (Def. Exh. A, Dr. Small, August 27, 2021, EAMS pp. 50 – 51, and pp. 68 – 82.) The RFA was submitted for Utilization Review, (UR) and the Non-Certification Recommendation was issued on September 3, 2021. (Def. Exh Aa, EAMS pp. 8 – 9; Def. Exh. C.) On September 13, 2021, Dr. Small submitted an Evaluation Report including an RFA that was a "Resubmission – Change in Material Facts" requesting authorization for the Functional Restoration Program that had previously been denied on September 3, 2021. (App. Exh. 1, Dr. Small, September 13, 2021.) The Independent Medical Review Final Determination Letter, upholding the September 3, 2021 Denial was issued on October 12, 2021. (Def. Exh. B, IMR Determination.)

The parties proceeded to trial on January 31, 2022. The issues submitted for decision were, the need for further medical treatment, and the September 13, 2021 RFA and report from Dr. Small. (Minutes of Hearing (MOH), January 31, 2022, p. 3.)

DISCUSSION

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. 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, 413];

Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) The issue of applicant’s entitlement to the medical treatment requested by Dr. Small is a “threshold” issue and is properly subject to reconsideration.

The MOH and the exhibits submitted by the parties, do not contain, or refer to, any objection made by defendant on the issue of proceeding to trial nor is there any reference to exhibits being offered by defendant that were not admitted into evidence. Also, in the Petition, defendant makes no reference to the actual trial record, and defendant’s arguments are based on what appear to be off-the-record discussions between the parties and the WCJ.

Although defendant’s arguments do not pertain to the actual issues submitted for decision, the Appeals Board has the authority to address issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (Lab. Code, §§ 5906, 5908; *Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]; *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Our review of the record indicates that the actual issue submitted for decision was whether Dr. Small’s September 13, 2021 RFA and Evaluation Report document a change in the facts upon which UR denied the August 27, 2021 RFA regarding the Functional Restoration Program.

Pursuant to Labor Code section 4610(k):

A utilization review decision to modify or deny a treatment recommendation shall remain effective for 12 months from the date of the decision without further action by the employer with regard to a further recommendation by the same physician, or another physician within the requesting physician's practice group, for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.

(Lab. Code, § 4610.)

Consistent with the provisions of Labor Code section 4610(k), Administrative Director Rule 9792.9.1(h) states:

A utilization review decision to modify, delay, or deny a request for authorization of medical treatment shall remain effective for 12 months from the

date of the decision without further action by the claims administrator with regard to any further recommendation by the same physician for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision. (Cal. Code Regs., tit. 8, § Rule 9792.9.1.)

In the “Utilization Review-Change In Material Facts” portion of his September 13, 2021 report Dr. Small responded to the UR doctor’s explanation for not authorizing the Functional Restoration Program requested by Dr. Small. (App. Exh. 1, Report, pp. 2 – 5.) Dr. Small repeatedly disputed the UR doctor’s reasoning and conclusions. For example, he stated:

UR Gart's opinion on rehabilitation potential is directly contradicted by the findings of the August 2021 multidisciplinary evaluation. ...¶ ... Again, the opinion of UR Gart is contradicted by the findings of the multidisciplinary team. (App. Exh. 1, pp. 2 - 3.)

Although Dr. Small explained why he disagreed with UR Dr. Gart, his arguments are not evidence of a “change in the facts material to the basis of the utilization review decision.” (Lab. Code, § 4610; Cal. Code Regs., tit. 8, § Rule 9792.9.1.) Having reviewed the September 13, 2021 RFA, the report, and the September 9, 2021 Progress Report PR-2 (attached as pp. 10 – 14 of the RFA/report), we see no changes in applicant’s condition as reported by Dr. Small in the August 27, 2021 RFA. Thus, the September 13, 2021 RFA and the report do not warrant further action by the employer or the claims administrator. Otherwise stated, defendant was not required to submit the September 13, 2021 RFA for UR, and the record does not contain substantial evidence that supports the award of future medical treatment in the form of the Functional Restoration Program requested by Dr. Small.

Accordingly, we rescind the F&A and substitute a new Findings of Fact, finding that the September 13, 2021 report from Dr. Small does not constitute substantial evidence in support his September 13, 2021 RFA; that Utilization Review of the September 13, 2021 RFA was not required; and that applicant is not entitled to undergo the Functional Restoration Program at defendant’s expense.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of February 7, 2022, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Elaine Holguin, while employed in the city of Orange, California, on November 15, 2005, by First United Methodist Church, whose workers' compensation insurance carrier was Guideone Mutual Insurance Company, sustained injury arising out of and occurring in the course of employment to her neck, back, shoulders, wrists, hips and knees.
2. The September 13, 2021 report from Scott Small D.O., did not document a change of material facts and does not constitute substantial evidence in support his September 13, 2021 Request For Authorization.

3. Utilization Review of the September 13, 2021 Request For Authorization from Scott Small D.O., was not required.
4. Applicant is not entitled to undergo the Functional Restoration Program requested by Scott Small D.O., at defendant's expense.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 31, 2022

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

**ELAINE HOLGUIN
LAW OFFICES OF THOMAS F. MARTIN
GUIDE ONE LEGAL**

TLH/pc

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