

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

KYUNGJU HONG, *Applicant*

vs.

AMERICAN AGE, INC.; STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Number: ADJ9337517
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons stated in the WCJ's report, which we adopt and incorporate, and discussed below, we will affirm the WCJ's decision.

As outlined in the WCJ's report, the evidentiary record shows that home health care was not actually offered to applicant. We therefore do not address whether applicant's December 28, 2020 letter constituted a refusal of care. Our decision here should thus not be construed as an explicit or implicit endorsement of whether applicant's request regarding nurses' COVID-19 testing information is reasonable. Defendant remains obligated to provide home health care to applicant 24 hours per day, 7 days per week pursuant to the parties' December 10, 2020 stipulations. (See Lab. Code, § 5702; see also *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1]; Lab. Code, § 4600.) If there is a dispute over the manner in which this care is offered or provided in the future, either party may seek intervention from the Appeals Board as warranted following a genuine, good faith effort to resolve the dispute informally. (Cal. Code Regs., tit. 8, § 10742.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on May 13, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 25, 2022

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

**KYUNGJU HONG
SOLOV & TEITELL
STATE COMPENSATION INSURANCE FUND**

AI/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

- | | | |
|----|---|---|
| 1. | Applicant's Occupation:
Applicant's Age:
Dates of Injury:
Parts of Body: | Production Processor
36 (at time of injury)
8/13/12 – 12/20/13
nose (rhinitis), cervical spine, lumbar spine,
right upper extremity, right wrist, right hand,
right shoulder, right fingers, thoracic outlet
syndrome for right upper extremity, complex
regional pain syndrome for right upper
extremity |
| 2. | Identity of Petitioner:
Timeliness:
Verification: | <u>Defendant</u> filed the Petition.
The petition is timely .
A verification is attached to the petition. |
| 3. | Petitioners contention: | Defendant contends that: The WCJ did not
properly consider the evidence when
determining whether Defendant had met its
burden of proof regarding its offer of medical
care, and its claim that Applicant improperly
refused medical care. |

II.
FACTS

Pursuant to Stipulation of the parties, applicant was adjudicated to be 100% disabled on 4/22/2019. Subsequently, the parties could not agree on the issue of home healthcare, and agreed to utilize Irene Mefford to perform a home healthcare assessment. The parties continued to disagree after Ms. Mefford produced her report, and this matter was eventually set for an Expedited Hearing regarding applicant's need for home healthcare, and subsequently proceeded to trial, and a decision issued.

Ms. Mefford had produced a report indicating that applicant did not require home healthcare. However, at the trial, the parties admitted that she had not been sent a joint letter setting forth what the parties were requesting her to do, and she had apparently been retained via phone call. Further, she was not provided with any subsequent medical reporting from the Primary Treating Physician. She was not asked to do a re-evaluation, nor was she deposed.

The Court appointed Sue Coleman to perform a home healthcare evaluation, and she completed a report November 17, 2020 finding that applicant

required home healthcare 24 hours a day, seven days a week. No party appealed the 10/14/2020 decision.

The report from Ms. Coleman was quite comprehensive and specific regarding applicant's activities of daily living, her limitations, and her requirements for care. Ms. Coleman's report indicated that an RN assessment was needed once a month to ensure the applicant's optimal safety and provide patient education to applicant and her husband, and made extensive recommendations regarding medical equipment needed by applicant. The report recommended nurse case management services by an experienced RN.

The WCJ had deferred the decision of whether applicant required home healthcare subsequent to receipt of Nurse Coleman's report. The matter was set for another Expedited Hearing on 12/10/2020 regarding this issue, and at that time the parties entered into a Stipulation that Defendant would provide home healthcare pursuant to the opinion of Nurse Coleman. The parties also agreed that the *Dubon* issue raised by applicant was resolved, and also agreed to the rate to be paid to the provider, which was applicant's husband at that time.

Thereafter, Defendant made arrangements with Continuity Care Home Nurses regarding home healthcare. They called applicant's home on 12/24/2020 to make an appointment to send a nurse out the next week. Apparently there was some confusion over this call and applicant's husband called Applicant's Attorney, who apparently believed Continuity Care was attempting to send a nurse out that same day. Applicant's attorney wrote an email and sent correspondence to defense counsel on 12/28/2020 setting forth multiple requirements before anyone from Continuity Care could meet with applicant. Further, Applicant required that each person sent to applicant's home by Continuity Care sign a declaration stating that they had received a negative Covid-19 test, would wear a mask and face shield, and would consent to temperature checks by applicant's family. Defendant responded by email that same day.

The parties could not come to an agreement and Defendant filed a request for Expedited Hearing on 1/29/2021 alleging an unreasonable refusal of medical care by applicant. At that hearing the WCJ suggested that Sue Coleman be sent to the home to determine, among other things, whether applicant's husband was an appropriate home healthcare provider. This suggestion was declined by Defendant. The matter proceeded to trial on 3/4/2021 and was continued to 4/13/2021. The only issue was whether applicant had unreasonably refused care offered by Defendant.

A Korean interpreter was provided for both applicant and her husband during trial. Applicant's disability was to the extent that she was unable to raise her right hand to take the oath before testifying.

Applicant testified at trial that her husband had been providing home healthcare to her and she wished for him to continue to be her provider. She testified that she was not aware of the phone call on 12/24/2020 since her husband answered the phone. Applicant's husband testified that he took the call on 12/24/2020 and remembers he referred the caller to the applicant attorney, but that the substance of the call was that they would be sending someone within a week. The caller on the phone did not say they would be sending someone to the home on 12/24/2020. The husband also testified that he speaks English "just a little" but was able to understand the person calling on the phone regarding scheduling an appointment in one week. Upon questioning by the Court, applicant's husband said he had no training as a caregiver, and would call 911 if his wife needed help.

Trial briefs were provided by both parties, and both applicant and defendant seemed to be under the impression that Continuity Care attempted to send someone to the applicant's home on 12/24/2020.

Linda Ginsburg, who is both an RN and a member of the California Bar, testified at trial on behalf of Defendant. She works for Continuity Care Home Nurses. She had previously written a letter regarding the 12/28/2020 communications from applicant counsel, and testified regarding the requests made by applicant's counsel. The essence of her testimony was that the Covid requests made by applicant's counsel were unreasonable. She testified that Covid results are protected private healthcare information and there is no way anyone can determine when they came into contact with the disease. She testified that she believed the requests made by applicant counsel in the letter of 12/28/2020 were ridiculous and unconscionable.

She testified on direct that Continuity Care had received a referral to do an RN evaluation and determine what care the Applicant needed. She testified on cross that State Fund selected the interpreter and she had no control over that. She further testified that she did not know about the RN evaluation that had already been performed. She doesn't know who requested the evaluation by Continuity Care. She thought the nurse case manager, Sue Coleman, had made the referral. She testified that she believed the evaluation was requested to determine if Applicant needed home healthcare. The nurse that was eventually sent was sent there to provide an evaluation and provide recommendations for home healthcare.

She testified that the nurse that was eventually sent was not sent there to provide home healthcare services. There was no care plan in place when the nurses were sent to the home. She testified that the nurses were sent to determine the level of care needed. No one discussed with State Fund how the transfer of care would be completed, and there was no discussion with applicant's attorney prior to the nurse's visit.

She testified on redirect that an RN evaluation is a necessary step before provided home healthcare and you don't want to put the wrong level of care there, and an RN evaluation is set up before every new case.

Sue Coleman testified as a rebuttal witness and confirmed that she had completed a nurse case evaluation and did not contact Continuity Care to provide an additional evaluation. She testified that applicant is a high risk patient because she is "essentially a quad" and that she would ask a caregiver if they had been vaccinated, and that she would probably not retain a caregiver who had not been vaccinated.

III. **DISCUSSION**

The testimony indicates that Continuity Care did not receive sufficient and appropriate information regarding applicant's case at the time of the referral. Just as Irene Mefford, the original nurse case manager, was given any information by the parties prior to her completing a nurse case manager evaluation, Continuity Care evidently was not given any information about what had transpired in this case prior to being retained.

Although neither party asked Linda Ginsburg if Continuity Care had been given a copy of Sue Coleman's report, it is clear that Continuity Care was not. Linda Ginsburg did not even know who made the initial referral. She thought it might have been Sue Coleman. A review of Sue Coleman's report would have indicated the level of care needed by Applicant, and what specifically she needed. If Continuity Care had been given a copy of the report, their only concerns should have been how to provide the care needed as set forth in Sue Coleman's report, and whether applicant's husband was an adequate care provider, and if not, how to accomplish a transfer of care pursuant to the requirements of WCAB Rule 9767.9

Instead, Continuity Care believed they were sent to applicant's home to determine if home healthcare was needed at all. Linda Ginsburg testified that the nurses were not sent to provide healthcare to applicant, but to do an evaluation.

The burden of proof rests upon the party holding the affirmative of the issue. Labor Code Section 3202.5. Defendant alleges applicant unreasonably refused medical care. It is this Court's determination that no care was ever offered to applicant. The Defendant's own witness testified that no care was to be offered when Continuity Care initially went to applicant's home. Continuity Care seemed to have no knowledge of the evaluation provided by Sue Coleman, and no knowledge of her recommendations. Continuity Care did not even have knowledge as to whom had referred them to applicant in the first place. Pursuant

to testimony from Linda Ginsburg, Continuity Care believed they were there to do the Nurse Case Evaluation regarding home healthcare.

Defendant has not met its burden of proof as to applicant unreasonably refusing medical care, because it is this Court's finding that no care was ever offered. The other issues raised by Defendant cannot even be reached because no medical care was offered in the first place.

The Court does not dispute that Defendant has the right to arrange care within its MPN, and that applicant does not have an unfettered right to have treatment rendered by her husband. The Court does have concerns that applicant's husband may not be the appropriate caregiver for someone who is "essentially a quad," especially in light of the fact that he has no training as a caregiver, and by his own admission, speaks little English. The Court has concerns that the husband's approach to his wife needing help is to call 911. What if he cannot be understood immediately by the 911 operator? What if his wife is bleeding or unable to breathe? Time may be of the essence and the Court believes that a trained caregiver is preferable for someone of applicant's limited abilities.

As Covid vaccines are now widely available, not only for caregivers, but also for applicant and her husband, applicant may not have the same concerns about Covid exposure now that she did in January of 2021.

IV.
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the defendant's Petition for Reconsideration be ordered denied for the reasons stated above.

Dated: 6/11/2021
LOIS OWENSBY
Workers Compensation Judge