

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

URBANO CARLOS, *Applicant*

vs.

**BUREAU OF AUTOMOTIVE REPAIR;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ12795671
San Bernardino 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 applicant's Petition for Reconsideration, defendant'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, we will affirm the Findings and Order.

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 June 14, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

I DISSENT. (See Attached Dissenting Opinion.)

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 25, 2022

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

**LAW OFFICES OF LUCY BISHOP
STATE COMPENSATION INSURANCE FUND
URBANO CARLOS**

AI/pc

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

DISSENTING OPINION OF COMMISSIONER SWEENEY

I respectfully dissent. I would rescind the Findings and Order and return this matter to the trial level for further development of the record on the medical necessity of the recommended Tempurpedic bed.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The parties do not dispute that defendant’s utilization review decision was untimely. The Appeals Board thus has jurisdiction to address medical necessity of the recommended Tempurpedic bed. (See *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*).) There is evidence in the record supporting the need for this recommendation as part of medical treatment, although Dr. Nick does not cite to evidence-based guidelines in the reports in evidence.¹ In lieu of denying applicant treatment that may be medically necessary and reasonable to cure or relieve from the efforts of the injury, the Appeals Board should obtain additional evidence regarding whether the recommended bed must be provided on an industrial basis.

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

¹ Both parties acknowledge that this treatment modality is not addressed in the Medical Treatment Utilization Schedule (MTUS). (Lab. Code, §§ 4600(b), 5307.27; see also Lab. Code, § 4610.5(c)(2) [defining “medically necessary” and “medical necessity” as treatment based on certain standards].)

The proper method to develop the record is thus for the parties to return to the physicians who have already reported in this case, which in this matter would include applicant's treating physician.

I would thus rescind the Findings and Order and defer the issue of medical necessity of the Tempurpedic bed pending further development of the record.

Therefore, I dissent.



WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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**LAW OFFICES OF LUCY BISHOP
STATE COMPENSATION INSURANCE FUND
URBANO CARLOS**

AI/pc

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

REPORT AND RECOMMENDATIONS
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: In dispute
Applicant's Age: 54
Date of Injury: January 10, 2019
Parts of Body Injured: Head

2. Identity of Petitioner: Applicant has filed the Petition
Timeliness: The petition is timely
Verification: A verification is attached to the petition

3. Date of service of Findings and Award: June 14, 2022

II
CONTENTIONS

1. That by the Decision, the Appeals Board acted without or in excess of its powers;
2. The evidence does not justify the Joint Findings of Fact.

III
FACTS

The Applicant, Urbano Carlos, sustained a specific injury on January 10, 2019 to his head while working for defendant Bureau of Automotive Repair in Rancho Cordova, California. Applicant further asserted injury to his vision, hearing, and neck as a result of this January 10, 2019 specific injury; these additional body parts/systems are currently in dispute.

The Applicant's primary treating physician is Dr. Saeed Nick. Dr. Nick had conducted an initial evaluation of the Applicant on September 7, 2021, diagnosing the Applicant with dizziness and disequilibrium. (Joint Exhibit A.) On October 14, 2021, Dr. Nick had requested that the Applicant be provided with a Temperpedic adjustable king size bed. (Joint Exhibit B.) This request was memorialized in a Request for Authorization form.

The Defendant did not issue a timely Utilization Review determination in relation to Dr. Nick's request for a Temperpedic adjustable king size bed. Thus, Applicant counsel filed a Declaration of Readiness to Proceed to an Expedited Hearing on March 21, 2022 as to the issue of entitlement to medical treatment; this was in relation to the aforementioned Temperpedic adjustable king size bed.

During the April 11, 2022 Trial, the parties stipulated that Defendant did not issue a timely Utilization Review determination, and thus agreed that the WCAB has jurisdiction to determine medical necessity of treatment requested.

The WCAB served its Opinion on Decision on June 14, 2022, finding that the Temperpedic adjustable king size bed was not medically necessary. On June 29, 2022, the Applicant, by and through his counsel, filed a Petition for Reconsideration, contending that the undersigned WCALJ acted without or in excess of its powers and that the evidence does not justify the findings of fact.

IV **DISCUSSION**

Under Labor Code section 5900(a), a Petition for Reconsideration may only be taken from a “final” order, decision, or award. 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) or determines a threshold issue that is fundamental to the claim for benefits (*Maranian v. Workers’ Comp. Appeal Bd.* (2000) 81 Cal. App. 4th 1068, 1070.) Pursuant to Labor Code section 5903, any person aggrieved by any final order, decision, or award may petition for reconsideration upon one or more of the following grounds:

- (a) That by the order, decision, or award made and filed by the appeals board or the workers’ compensation judge, the appeals board acted without or in excess of its powers.
- (b) That the order, decision, or award was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order, decision, or award.

Applicant asserts under Labor Code section 5903 that the undersigned acted without or in excess of his powers and that the evidence does not justify the Findings of Fact.

Whether Dr. Nick’s Reporting is Substantial Medical Evidence

California Code of Regulations section 9792.21.1(a) states that treating physicians *shall* conduct the medical search sequence for the evaluation and treatment of injured workers. A treating physician’s requirement to conduct the medical search sequence is not limited to situations where a treating physician is attempting to rebut the MTUS.

Petitioner asserts that there are no explicit requirements within the Labor Code or the California Code of Regulations that compels a treating physician to provide within his/her Request for Authorization form a citation to the guideline or study containing the recommendation he or she believes guides the reasonableness and necessity of the requested treatment. To bolster this argument, Petitioner relies upon the permissive language in California Code of Regulations section 9792.21.1(b)(1)(A), which indicates that a treating physician *may* provide the guideline or study after having conducted the medical search sequence in scenarios where the recommended treatment is not addressed by the MTUS. Petitioner contrasts this with the language found under subsection (b)(1)(B), which uses mandatory language that *requires* a treating physician to specifically provide the citation to the guideline or study believed to guide the reasonableness and necessity of treatment in scenarios where the treating physician is attempting to rebut the MTUS.

Though Petitioner is correct that the plain language of California Code of Regulations section 9792.21.1(b)(1)(A) does not explicitly require citation to the guideline or study supporting the reasonableness and necessity of the sought-after treatment, a treating physician is still mandated to conduct the medical evidence search sequence identified under subsections (a)(2)(A)-(C).

Furthermore, in situations where a Utilization Review determination is untimely, the determination of medical necessity may be made by the WCAB based on *substantial medical evidence*. (*Dubon v. World Restoration, Inc.* (79 Cal. Comp. Cases 1298, 1300.) Notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 242.) All parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (*Lab. Code*, § 3202.5.)

The requested medical treatment at issue in this case is Primary Treating Physician Dr. Saeed Nick's request for a Temperpedic adjustable king size bed. The parties stipulated that Defendant did not issue a timely Utilization Review determination for this requested treatment. Thus, the undersigned WCALJ was tasked with determining the medical reasonableness and necessity of the requested bed. The undersigned now reiterates his finding that Dr. Nick's reporting is not substantial medical evidence as it relates to the issue of medical reasonable and necessity of the requested bed. Therefore, Applicant has failed to meet his burden of proof.

First, there does not appear to be any dispute that the adjustable bed as requested by Dr. Nick is not addressed by the MTUS. Nonetheless, there is no indication whatsoever confirming whether Dr. Nick complied with Labor Code section 4604.5(d) and the California Code of Regulations section 9792.21.1(a) as he neither referenced the MTUS, or the lack of guidance therefrom, nor cited

any other evidence-based medical treatment guidelines that are recognized by the national medical community and scientifically based or current studies that are scientifically based, peer-reviewed, and published in journals that are nationally recognized by the medical community. Furthermore, Petitioner seems to conflate a treating physician's reporting requirements/recommendations with Applicant's burden of proof; though Dr. Nick may not have been explicitly required to provide the guideline or study supporting the reasonableness and necessity of the Temperpedic adjustable king size bed per California Code of Regulations section 9792.21.1(b)(1)(A), the Applicant was still required to meet his burden of proof that the sought-after treatment is medically reasonable and necessary based on substantial medical evidence per *Dubon, supra* and *Sandhagen, supra*.

In this case, the undersigned WCALJ did not find Dr. Nick's reporting to amount to substantial medical evidence as to the issue of medical reasonableness and necessity of the Temperpedic adjustable king size bed due to the complete the lack of any significant explanation as to the same beyond Applicant's complaints of dizziness and disequilibrium.

Petitioner did not point to any language within California Code of Regulations section 9792.21.1(b)(1)(A), or in any other Code or Regulation that obviates the Applicant's burden of proof other than the general mandate under Labor Code section 3202, which states that divisions of the Labor Code be liberally construed by the Courts with the purposes of extending benefits to the injured worker. However, the mandate under Labor Code section 3202 does not relieve a party from meeting its evidentiary burden of proof. (*Rogers v. Workers' Comp. Appeals Bd.* (1985) 172 Cal. App. 3d 1195, 1202; *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 753.)

Of note, Petitioner has further argued that the undersigned WCALJ erred in relying upon the holdings in *Pike v. City of Long Beach* 2019 Cal. Wrk. Comp. P.D. LEXIS 455, *Aguilar v. City of Los Angeles*, 2021 Cal. Wrk. Comp. P.D. LEXIS 3, and *Dapprich v. Sun Microsystems* 2018 Cal. Wrk. Comp. P.D. LEXIS 326 in reaching his findings, asserting that these cases carry little weight of authority given that they have not been designated as significant panel decisions.¹ Though such cases can still be considered to the extent that they are persuasive, the undersigned WCALJ had actually relied upon the binding authority of the Labor Code, California Code of Regulations, the en banc case of *Dubon, supra*, and the California Supreme Court case of *Sandhagen, supra*, as indicated above, in reaching his findings.

Thus, the undersigned continues to believe that Dr. Nick's reporting as to the reasonableness and necessity of the requested Temperpedic adjustable king size bed is not substantial medical evidence, that the Applicant failed to meet his

¹ The introductory signal "See" within a parenthetical citation introduces citations to weaker support. (California Style Manual, pg. 9, §1:4.)

burden of proof as to the reasonableness and necessity of the same, and therefore, that the Temperpedic adjustable king size bed is not medically reasonable or necessary.

Whether the Court Should Order Further Development of the Record

Though it is well established that the appeals board may not leave undeveloped matters that require further evidence, the board's power to develop the record cannot be used to circumvent the clear intent and language of Labor Code section 5502(d)(3). (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal. App 4th 928, 935.)

Here, the Petitioner's counsel filed a Declaration of Readiness to Proceed to An Expedited Hearing on March 21, 2022, certifying under the penalty of perjury that she was ready to proceed to hearing and that her discovery was complete on said issue. At the Expedited Hearing, counsel for Defendant suggested allowing additional time to seek clarification from Dr. Nick as to the specific type and brand of bed requested. After attempts to obtain clarification from Dr. Nick's office during the Expedited Hearing failed, Applicant counsel insisted on proceeding forward on the record based on the available documentary evidence. Though the parties procedurally proceeded to an Expedited Hearing instead of a Mandatory Settlement Conference, the parties still participated in the process of framing stipulations and issues, listing exhibits, and disclosing witnesses as contemplated under Labor Code section 5502(d)(3) in order to submit the case for decision.

It is clear that Petitioner was aware that Dr. Nick did not provide any discussion as to the medical evidence search sequence, or any other significant discussion as to the reasonableness and necessity of the requested Temperpedic adjustable king size bed, as Petitioner contended that such discussions were merely permissive under California Code of Regulations section 9792.21.1(b)(1)(A). Relying upon his counsel's reading and interpretation of the aforementioned Regulation section, it appears clear that the Petitioner elected to proceed forward with the outstanding medical record, believing Dr. Nick did not need to cite any guideline or study supporting the request for a Temperpedic adjustable king size bed.

Though Petitioner contends that denying the Temperpedic adjustable king size bed would result in a harsh outcome for the Applicant, Petitioner did not provide any explanation as to why evidence supporting the requested treatment was not earlier available or why it could not have been obtained in the exercise of due diligence.

Given Petitioner's counsel's declaration under of penalty of perjury indicating her readiness to proceed to hearing on the issue of entitlement to treatment and her apparent knowledge that Dr. Nick's reporting did not offer

any discussion to the medical evidence search sequence or any other significant discussion as to the reasonableness and necessity of the requested treatment, the undersigned does not believe that further development of the record as to the issue presented should be permitted.

V
RECOMMENDATION

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

DATE: July 13, 2022

JASON L. BUSCAINO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE