

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

**MANUEL HERNANDEZ, *Applicant***

**vs.**

**RC WENDT PAINTING, INCORPORATED;  
CYPRESS INSURANCE COMPANY,  
administered by BERKSHIRE HATHAWAY, *Defendants***

**Adjudication Number: ADJ11449146  
Long Beach District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Amended Report and Recommendation on Petition for Reconsideration dated July 15, 2022 issued by 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 grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the June 16, 2022 Findings and Order.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the June 16, 2022 Findings and Order is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 16, 2022 Findings and Order is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

4. The issue of entitlement to medical treatment is deferred.

**ORDERS**

\* \* \*

(b) The parties shall engage in discovery in order to further develop the medical evidence.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 29, 2022**

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

**MANUEL HERNANDEZ  
ODJAGHIAN LAW GROUP  
DORMAN & SUAREZ**

**PAG/abs**

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

**AMENDED\* REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION**

**I.  
INTRODUCTION**

The following information shall be contained in the introduction of the report:

Defendant has filed a timely, verified petition for reconsideration (Petition) to this judge's findings and order (F&O), issued on June 16, 2022. Such decision came after the parties' expedited trial on May 25, 2022.

The Petition, filed and served on June 30, 2022, only challenges this judge's determination that defendant shall provide applicant Manuel Hernandez<sup>1</sup> an extensive, post-acute rehabilitation program for four weeks, supporting a request for authorization (RFA) which defendant untimely denied.<sup>2</sup> The Petition does not challenge the finding that the board has jurisdiction over the parties' treatment dispute, instead of being controlled by the UR<sup>3</sup> and IMR<sup>4</sup> process.

The remedy petitioner seeks is to rescind the order and to find that substantial medical evidence supports the denial of the treatment sought.<sup>5</sup>

Applicant has not yet filed an answer to the Petition.

Absent persuasive argument from applicant as to why this judge's decision should be upheld, this judge recommends that the board grant reconsideration, in part, to the Petition. As will be summarized in this Report, both parties' medical evidence are not truly substantial. Instead, this judge's order should be vacated, and remanded for further development of the medical record.

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\* The district office initially, erroneously served the wrong document instead of this Report on July 14. Parties are kindly directed to disregard and destroy the prior report.

<sup>1</sup> Applicant, age 51, while employed as a painter on August 20, 2018, sustained industrial injury to his head, neck, upper extremities, and lower extremities, and claims to have sustained injury to his ears, trunk, and hernia.

<sup>2</sup> There were other, relatively minor treatment and diagnostic procedures approved in the F&O. While defendant does not spend much time addressing directly these aspects of the F&O, they are also challenged. (See Petition, p. 8, l. 3-11.)

<sup>3</sup> Utilization Review.

<sup>4</sup> Independent Medical Review.

<sup>5</sup> See Petition, p. 8, ll. 14-17.

## **II. FACTS**

**Brief Summary of Case:** Applicant sustained what appears to be very serious injuries from a fall from a scaffold at work. As alleged in applicant’s petition for serious and willful benefits:

“On August 20, 2018, the applicant was working on a scaffold. The scaffold shifted, the applicant lost his balance and fell 13 [feet] to the ground. The applicant suffered injuries to his head, neck, back, shoulders, lower extremities, pelvis, left upper extremity, bilateral ear and right inguinal hernia.”<sup>6</sup>

Although there not yet any findings on the exact extent of applicant’s injuries, it appears there would be no reasonable dispute that applicant’s injuries are severe and require extensive treatment.<sup>7</sup>

**Applicant’s Medical Evidence:** Applicant relies predominantly upon very lengthy medical reporting from Dr. Marcel Ponton, including a 50 page, single-spaced report issued in April 2022, summarizing 175 medical reports concerning applicant’s treatment record.<sup>8</sup> Following the summary of the medical reporting, the doctor provided detailed medical analysis for 12 pages.<sup>9</sup> Such summary notes that applicant sustained traumatic brain injury and multiple fractures, among other medical consequences.<sup>10</sup> It appears applicant has remained temporarily totally disabled since his injury.<sup>11</sup>

As to the treatment at issue, however, Dr. Ponton summarily concludes that applicant should receive ongoing treatment as recommended in the RFA.<sup>12</sup> As defendant correctly points out, this reporting “makes no mention of MTUS [13]ACOEM[14] guidelines” and “gives no explanation as to why MTUS-ACOEM is not applicable.”<sup>15</sup>

Applicant also relied upon the reporting of RFA doctor David Patterson, which provided a much briefer analysis regarding the medical issues here. It appears that this analysis, as defendant notes, suffers from “several contradictions” and also does not apply MTUS-ACOEM.<sup>16</sup>

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<sup>6</sup> Petition for Serious and Willful Benefits, 4/9/2019, p. 1, ll. 22-25.

<sup>7</sup> See generally Applicant’s Exhibit (AX) 4.

<sup>8</sup> See AX 4.

<sup>9</sup> *Id.*, pp. 37-48.

<sup>10</sup> AX 4, p. 38.

<sup>11</sup> *Id.*, pp. 1-37, particularly the second to last report summarized.

<sup>12</sup> Regarding the four-week rehabilitation program at issue, the RFA is documented in Joint Exhibit (JX) 1, dated October 28, 2021.

<sup>13</sup> Medical Treatment Utilization Schedule.

<sup>14</sup> American College of Occupational and Environmental Medicine.

<sup>15</sup> Petition, p. 5, ll. 23-26 (footnotes added).

<sup>16</sup> *Id.*, p. 7, ll. 4-5.

**Defendant's Medical Evidence:** Defendant urges a denial of the treatment at issue due to the reporting of UR doctor Alan Mirasol. Defendant correctly points out that unlike applicant's evidence, Dr. Mirasol at least extensively quotes from MTUS-ACOEM.<sup>17</sup> However, Dr. Mirasol only reviews three (3) medical records to form the basis of his recommended UR denial: Dr. Patterson's RFA, his accompanying report, and a report from a Dr. Sangril in September 2021.<sup>18</sup>

### **III.** **DISCUSSION**

Conceding (absent a persuasive answer from applicant) the lack of substantial medical evidence from the applicant, defendant's evidence also suffers from a lack of substantiality. Quite simply, defendant's medical evidence has the opposite problem of applicant's: Although it quotes extensively from MTUS-ACOEM, it applies it to a clearly inadequate medical record of only three documents. It is unsurprising, given the exceeding limited medical reports reviewed, that Dr. Mirasol denied the treatment. But this conclusion is not substantial.

As hinted by the Opinion on Decision, one possible conclusion this judge could have made was to vacate the submission and order further development of the medical record.<sup>19</sup> While it was not clear such a ruling would have been upheld given defendant's challenge to board jurisdiction, defendant has now conceded our jurisdiction.

### **IV.** **RECOMMENDATION**

The judge respectfully recommends that the board grant reconsideration, for the purpose of vacating this judge's F&O in part, and for remanding this matter back to the trial level for further development of the medical record. The board should also vacate the F&O's Finding No. 4 (including subparagraphs a., b., and c.); vacate paragraph b) of the Order; and have the F&O amended as follows:

### **FINDINGS**

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4. The present medical record does not provide substantial medical evidence to determine whether defendant ought to provide the medical treatment at issue to the applicant.

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<sup>17</sup> *Id.*, p. 7, l 15 to p. 8, l. 2; see Defendant's Exhibit (DX) 1, pp. 4-10.

<sup>18</sup> *Id.*, p. 1. It is not clear how a carrier authorization notice would qualify as a medical record.

<sup>19</sup> Opinion on Decision, p. 2, fn. 5, citing *Bodam v. San Bernardino County* (2014) 79 Cal. Comp. Cases 1519, 1523 (panel decision).

**ORDER**

\* \* \*

b) The parties shall engage in discovery in order to further develop the medical evidence with regard to Finding No. 4.

DATE: July 15. 2022

**JOHN A. SIQUEIROS**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE