

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELENO PEREZ, *Applicant*

vs.

**S Q & SON LABOR SERVICE;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ2278057
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration 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 deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 11, 2023

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

**DENTAL TRAUMA CENTER
LAW OFFICE OF SAAM AHMADINIA, APC
STATE COMPENSATION INSURANCE FUND, LEGAL**

AS/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

On 7/12/2023 lien claimant, The Dental Trauma Center, filed a petition for reconsideration of the undersigned's 6/22/2023 First Amended Opinion on Decision wherein the undersigned opined as follows:

Applicant, Eleno Perez, born [XX-XX-XXXX], while employed on 7/13/2006, as a lemon picker, at Camarillo, California, by SQ and Son Labor Service, sustained injury arising out of and in the course of employment to the heart, right elbow, left foot, lower back, right lower leg, psyche, shoulders, and right knee, and claims to have sustained injury arising out of and in the course of employment to the mouth, teeth, head, arm, foot, circulatory system, digestive system, abdomen, left ankle, and right upper arm. At the time of injury, the employers' workers' compensation carrier was State Compensation Insurance Fund. As a result of said accident it is beyond dispute that applicant suffered serious orthopedic injuries requiring surgery and medications. It is also beyond dispute that applicant suffered from internal and psychiatric injuries as compensable

consequence. Applicant's case-in-chief resolved by Order Approving Compromise and Release issued by Hon. William Carero, on 1/29/2021 for \$200,000.00. Jurisdiction was reserved over liens. The disputed lien of the Dental Trauma Center was tried before the undersigned on 5/4/2023. Defendant requested time to file a brief. Defendant was given two weeks to file a brief. The matter was then submitted for decision on 5/18/2023.

The Dental Trauma Center seeks reimbursement for two dates of service, 7/13/2016 and 7/25/2016, for medical treatment where \$14,438.94 was billed. Nothing was paid. The balance plus penalties and interest is sought by the Dental Trauma Center. Defendant asserts the treatment was not reasonable or necessary, that there is no evidence to support a finding of injury to the mouth or teeth, and therefore the lien should be disallowed. On 7/13/2006, applicant, whose primary language is Spanish, and who performed field for in the United States for 43 years, was picking lemons when he was run over by a forklift. He sustained injury to the left foot, right knee, right shoulder, right elbow, and low back. He fractured two toes on the left foot. The right knee had a torn meniscus. On 2/26/2007, applicant had right knee surgery. On 8/26/2007, applicant underwent right shoulder surgery. Applicant had a bad result from the right shoulder surgery.

Applicant was in need of left shoulder surgery but turned it down due to the bad result from the right shoulder surgery. Applicant had not worked since the date of injury. See Orthopedic AME John Carr, M.D., report dated 8/19/2009, pages 1-2, lien claimant's exhibit #6. By 1/12/2008, applicant could not lift his right shoulder due to pain. See PQME report of Michael Z. Mekjian, Ph.D., report dated 11/15/2018, page 6, lien claimant's exhibit 7. On 3/14/2011, applicant had a second surgery to the right shoulder. See PQME report of Michael Z. Mekjian, Ph.D., report dated 11/15/2018, page 7, lien claimant's exhibit 7. In terms of the development of psychiatric symptoms, applicant reported that he began to notice the onset of depression approximately two to three years after the accident, beginning in approximately July 2008 or 2009. Applicant reported being embarrassed about how much time had passed since his injury, and not being able to work and financially provide for his family. He began to socially isolate from his family, and did not want to communicate with friends. Applicant noted the onset of anxiety around this same period. See PQME report of Michael Z. Mekjian, Ph.D., report dated 11/15/2018, page 5, lien claimant's exhibit 7. Defendant denied the claim of injury to the teeth and mouth. See defense exhibit F letter to applicant dated 6/21/2016. On 7/20/2016, applicant underwent an internal medicine evaluation by Arthur Lipper, M.D. due to complaints of headaches, disrupted sleep, teeth grinding at night, depression, anxiety, weight loss and weight gain. See PQME report of Michael Z. Mekjian, Ph.D., report dated 11/15/2018, page 7, lien claimant's exhibit 7. Applicant was prescribed Trazodone to assist with sleep by Dr. Armstrong. Applicant was thought to be a significant risk for chronic invalidism and dependency, due to his history of failed surgical outcomes. See PQME report of Michael Z. Mekjian, Ph.D., report dated 11/15/2018, page 9, lien claimant's exhibit 7. On 7/25/2016, applicant underwent an evaluation in Dentistry at The Dental Trauma Center. In terms of problems with the teeth and mouth, applicant had fractured teeth, #9 and #11 on an industrial basis due to Bruxism. See report of Dr. Schames dated 7/25/2016, page 25, lien claimant's exhibit #4. Dr. Schames issued 4 RFA's for treatment. Authorization was denied. See defense letter to Dr. Schames dated 11/3/2016, defense exhibit G. Based upon a review of the entire record, the undersigned found that applicant suffered from dry mouth, teeth grinding and fractured teeth on an industrial basis as a compensable consequence of his industrial orthopedic, internal and psychiatric injuries. Defendant did not reserve the right to conduct retrospective UR. See defense exhibit E, EOR/EOB/IPR dated 11/8/2016. Defendant did not seek a PQME in Dentistry. Defendant relies on the declaration of Sylvia Pulido, claims adjuster at SCIF, dated 3/10/2023, defense exhibit D,

with the three attachments thereto set forth as defense exhibits A, B and C. Defense exhibit A is eight pages from the American Academy of Dental Sleep Medicine, undated. Defense exhibit B is the Reimbursement Guide for Oral Appliance Therapy for Obstructive Sleep Apnea from the American Academy of Dental Sleep Medicine, 2009. Lien claimant objected at trial to the admissibility of said exhibits on the basis that said declaration and attachments were not listed as exhibits on the pretrial conference statement and were not served on opposing counsel prior to the close of discovery when the matter was set for trial. Counsel for defendant did not articulate good cause why with the exercise of due diligence said exhibits could not have been listed and served prior to setting the matter for trial. However, defendant asserted that the undersigned should take judicial notice of said exhibits as Ms. Pulido was listed as a witness, and the declaration was submitted in lieu of testimony. Lien claimant was given leave to address any due process concerns but chose to proceed on the record. The undersigned did take judicial notice of said exhibits A, B, C and D, and entered same into evidence. The undersigned found lien claimant sustained the burden to prove injury to the teeth and mouth on an industrial basis.

There is no basis for finding treatment for sleep reasonable on this record. The MTUS is the primary source for determining whether treatment is medically necessary. Because the MTUS cannot address every conceivable medical condition, or if there is an attempt to rebut the MTUS, CCR 9792.21.1 establishes the medical evidence search sequence that physicians must follow for evaluation and treatment of injured workers. It provides guidance in how to conduct a search for medical evidence in order to consistently and efficiently navigate the medical literature. First, physicians must search the recommended guidelines in the MTUS to find a recommendation applicable to the injured worker's medical condition or injury (CCR 9792.21.1(a)(1)). If a medical condition or injury is not addressed by the MTUS, or if the MTUS' presumption of correctness is being challenged, per CCR 9792.21.1(a)(2) the physicians must: 1. Search the current version of the ACOEM guidelines or Official Disability Guidelines (ODG) to find a recommendation applicable to the injured worker's medical condition or injury. The doctor must choose the recommendation that is supported with the best available evidence per CCR 9792.25.1 (discussed below). If no applicable recommendation is found, or if the physician believes there is another recommendation supported by a higher quality and strength of evidence, then; 2. Search the current version of other evidence-based medical treatment guidelines that are recognized by the national medical community and are scientifically based to find a recommendation applicable to

the injured worker's medical condition or injury. The physician must choose the recommendation that is supported with the best available evidence per CCR 9792.25.1. Medical treatment guidelines can be found in the National Guideline Clearinghouse at www.guideline.gov/. If no applicable recommendation is found, or if the physician believes there is another recommendation supported by a higher quality and strength of evidence, then; 3. Search for current studies that are scientifically based, peer-reviewed and published in journals nationally recognized by the medical community to find a recommendation applicable to the injured worker's medical condition or injury. The physician must choose the recommendation that is supported with the best available evidence per CCR 9792.25.1. A search for peer-reviewed published studies may be conducted by accessing the U.S. National Library of Medicine's database of biomedical citations and abstracts at www.ncbi.nlm.nih.gov/pubmed. Other searchable databases also may be used. The regulations require physicians to comply with the medical literature search sequence to ensure consistency when searching for medical evidence. See Sullivan On Comp, Chapter 7 Medical Treatment 7.31 Utilization Review-Medical Treatment Utilization Schedule.

The 7/25/2016 report is authored by Dr. Schames, a dentist. As indicated by the "Reimbursement Guide for Oral Appliance Therapy for Obstructive Sleep Apnea" published by the American Academy of Dental Sleep Medicine, "[d]entists may not generate the written order for oral appliance therapy themselves since they are not licensed to perform and interpret sleep tests and diagnose obstructive sleep apnea" (Defendant's Exhibit B, page 18). As Dr. Schames is not licensed to diagnose sleep apnea, the corresponding treatment cannot be supported on this record. The undersigned found lien claimant sustained the burden to prove the treatment except for sleep was reasonable. Reimbursement for said treatment is allowed, together with statutory increase pursuant to Labor Code section 4603.2(b)(2) and interest from the date of defendant's receipt of each billing.

FACTS

At the outset, it should be noted that the petition for reconsideration fails to seek reconsideration of the actual First Amended Findings Award and Order. The opinion is not subject to reconsideration. The petition should be denied on that basis.

The underlying Findings Award and Order states:

Lien claimant The Dental Trauma Center is hereby awarded reimbursement for dates of service 7/13/2016 and 7/25/2016 payable by defendant State Compensation Insurance Fund,

together with statutory increase pursuant to Labor Code section 4603.2(b)(2) and interest from the date of defendant's receipt of each billing. Jurisdiction was reserved over any dispute as to the reasonable amount payable and is to be resolved 10/17/16 for Immediate Emergency Medical Treatment of an Obstructive Airway Oral Appliance, see lien claimant exhibit 3, is found to be unreasonable and reimbursement is not Awarded herein.

Essentially, petitioner is taking issue with the fact reimbursement for the oral appliance was not awarded.

ISSUE #1: WCJ may take judicial notice of some documents even if they are not listed on the PTCS.

The undersigned took judicial notice of defense exhibits A, B, C and D. They were not listed on the PTCS. Nevertheless, the undersigned is allowed to take judicial notice of said documents.

Exhibit "C" for identification is the Findings and Order and Opinion on Decision by WCJ Peter Christiano dated August 29, 2022. Exhibit A consists of pages from the website of the American Academy of Dental Sleep Medicine; Exhibit B is the "Reimbursement Guide for Oral Appliance Therapy for Obstructive Sleep Apnea" published by the American Academy of Dental Sleep Medicine; and Exhibit C is the Findings and Order and Opinion on Decision by WCJ Peter Christiano dated August 29, 2022 in WCAB Case No. ADJ1219104. The WCAB must adhere to the same rules of judicial notice applicable to courts of record. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1426.) Consequently, the undersigned is allowed to take judicial notice of the records of any court of this state. (Calif. Evid. C. §452(d).)

WCJ did not err in allowing Ms. Pulido's statement in evidence.

Lien claimant cries foul that the undersigned allowed SCIF witness Ms. Pulido's statement into evidence because lien claimant was unable to cross examine her. Petition for reconsideration page 6, lines 3-5. Lien claimant was given the right to pursue further cross examination, but decided against it as it would delay proceedings. This was not on the minutes but will show up on the actual transcript.

ISSUE 2: E0486 was not authorized[,] and a 4062 Panel was not requested.

Defendant did not authorize[d] the oral appliance (E0468). Defendant did not under LC section 4062 request a panel in dental[.]

Lien claimant asserts that the undersigned should therefore find in lien claimant's favor. Petitioner must have evidence to sustain the burden of proof, which for the oral appliance does not exist on this record.

ISSUE 3: WCJ may rely on a reimbursement guideline.

Lien claimant asserts the undersigned may not rely on a reimbursement guideline when deciding the issue of reimbursement. Petition for reconsideration page 8, lines 8-18. No authority is cited to support this assertion. The undersigned disagrees.

ISSUE 4: Oral appliance for sleep apnea or bruxism not supported.

Petitioner asserts the oral appliance is unique, treats bruxism and sleep apnea and therefore, a licensed physician was not necessary for the prescription of the oral appliance. See petition for reconsideration page 8 line 19 to page 9, line 4. No authority is cited to support this assertion. The undersigned disagrees and notes the record does not support awarding reimbursement for the oral appliance.

Based upon this record, the undersigned recommends the petition for reconsideration be denied on the merits.

DATE: July 19, 2023

Michael K. Greenberg
WORKERS' COMPENSATION JUDGE