WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALEX WANG, *Applicant*

vs.

JM MANUFACTURING COMPANY, INC., dba JM EAGLE MANUFACTURING COMPANY; LIBERTY MUTUAL INSURANCE, *Defendants*

Adjudication Numbers: ADJ14083898; ADJ16008783
Pomona District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of defendant's Petition for Reconsideration (Petition) 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 is adopted and incorporated herein, we will deny reconsideration.

We note the WCJ's recommendation to sanction defendant for proceeding to trial to contest its liability for medical treatment approved by a Utilization Review (UR) provider at defendant's request and for filing an "equally meritless" and "frivolous" Petition for Reconsideration. (Report, p. 7.) While we decline to impose sanctions for filing the Petition for Reconsideration, we remind defendant that filing frivolous petitions and making unmeritorious arguments causes unnecessary delay and wastes judicial resources and could subject the offending party to sanctions. (See Lab. Code, § 5813; Cal. Code Regs., tit. 8, §10421(a), (b)(2), (b)(6)(A)(i).) However, while we do not impose sanctions for the filing of the Petition for Reconsideration, the WCJ is not precluded from considering sanctions in the first instance for frivolous conduct at the trial level.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 2, 2024

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

ALEX WANG
PEREZ LAW
MORGAN & LEAHY

AH/*cs*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Alex Wang, born [], while employed on December 23, 2020, as a maintenance technician, at Fontana, California, by JM Manufacturing Company, Inc., dba JM Eagle Manufacturing Company, whose workers' compensation carrier was Starr Indemnity and Liability Company administered by Liberty Mutual, sustained injuring arising out of and in the course and scope of employment to psyche and bilateral upper extremities.

The case proceeded to trial on the issue of whether Defendant was obligated to provide a home for applicant as approved by their own Utilization Review of the treating doctor's Request for Authorization. A Findings and Award/Opinion on Decision was issued on January 14, 2024.

Defendant has filed a timely Petition for Reconsideration, objecting to said decision in the following particular(s):

1. That the undersigned erred insofar as the evidence did not justify the finding of fact.
2. That the findings of fact do not support the order, decision or award.

FACTS ON DISPUTED ISSUES

On September 19, 2023, Jared Myers DO signed and submitted a Request for Authorization, on the appropriate DWC form, which listed, as required:

> *Complete Diagnosis: Complete traum amp of right shldr/up arm, level unsp, init; Depression, unspecified*
> *ICD-Code: S48911A, F32A*
> *Service Requested: Home Relocation to Rancho Cucamonga (Moving Costs and Cost of Home)*
> *Other Information: Rationale: 'Reasonably justified move to help improve his AOLs to live in a one story building, and combat the depression and anxiety living next to the work site' I MPN Provider*
>
> (JT Exhibit 1 page 2)

On September 26, 2023 Liberty Mutual Managed Care LLP Utilization Management – MediCall Clinical Solutions review determined that:

> *The prospective request for 1 Permanent Home Relocation to Rancho Cucamonga (Moving Costs and Cost of Home) to combat Depression and Anxiety between 09/26/2023 to 11/25/2023 is certified*
>
> (JT Exhibit 2, p. 1)

For utilization review purposes the review was timely as there were five business days from date of the request to date of certification[1].

Sixteen days after the RFA, on October 5, 2023, Defendant's attorney objected to the RFA and their clients' own Utilization Review provider's determination. Exhibit A.

The case proceeded to Expedited Trial on December 5, 2023. At that time the parties requested an opportunity to brief the issues for the court. This was allowed and the matter continued to January 10, 2024, at which time the matter was submitted for decision.

The court issued a Findings & Award/Opinion on Decision on January 14, 2024, which was served January 18, 2024. It was found that Defendant had to comply with their own UR authorization.

On February 12, 2024 Defendant filed the instant Petition for Reconsideration.

DISCUSSION

He who consents to an act is not wronged by it.
California Civil Code §3515.

Utilization Review Was Timely

Prior to 2004 and the enactment of SB 899 and implementation of revised Lab. Code § 4610, it was the WCAB that decided all medical treatment disputes. For dates of injury after 2004, the law mandated that all medical treatment requests be submitted by defendant to Utilization Review. Subsequently, in 2013, the regulations regarding IMR were enacted. The WCAB no longer has jurisdiction over medical treatment disputes. It was intended by the legislature for UR to have sole authority to approve, modify or deny medical modalities for injured workers.

Since Utilization Review became mandatory numerous unsuccessfully challenges to the process have been mounted. The courts routinely affirmed the mandatory nature of Utilization Review. The only narrow exception to the rule is in cases where the Utilization Review was untimely. *State Comp. Ins. Fund v. WCAB (Sandhagen) (2008) 44 Cal.4th 230*. Liberty Mutual's Utilization Review Provider conducted a review and issued a timely certification.

The primary exception to this general rule was established in the WCAB en banc decision of *Dubon v. World Restoration* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc). Under *Dubon* (and it's progeny: Dubon II and III), the WCAB held, "If a UR decision is untimely, or

[1] September 24, 2023 being a Sunday is not counted as a business day

there is no UR decision, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5."

Where a UR decision is timely, IMR is the sole vehicle for reviewing the UR physician's expert opinion regarding the medical necessity of a proposed treatment." *Dubon supra*, at pp. 1310–1311. IMR "is the exclusive mechanism for review of a utilization review decision." *King v. CompPartners, Inc.* (2018) 5 Cal. 5th 1039, 1048.

This is not a *Dubon*. There was a timely UR decision approving the RFA.

The Court Cannot Disturb a Timely UR Decision

This court has no jurisdiction to determine medical issues already approved by a timely Utilization Review determination. It is not up to this court to make any determination of a causal connection between the injury and the certified treatment. In a case involving a dispute over home health care, the appeals court noted that medical care for a claimant was an issue to be resolved in and by the utilization review process, not the workers' compensation judge (WCJ) or the Workers' Compensation Appeals Board (WCAB), the WCJ and the WCAB did not have jurisdiction to address and resolve the issue of home health care for the claimant. *Allied Signal Aerospace v. Workers' Comp. Appeals Bd.* (Cal. App. 2d Dist. May 15, 2019), 247 Cal. Rptr. 3d 802.

Rule 9792.9.1(b)(1) provides that if the claims administrator chooses to dispute liability, it has five business days from the date of receipt of the RFA to "issue a written decision deferring utilization review of the requested treatment, unless the requesting physician has been previously notified under this subdivision of a dispute over liability and an explanation for the deferral of utilization review for a specific course of treatment. The written decision *must* be sent to the requesting physician, the injured worker, and […] the injured worker's attorney." (Emphasis added.)

Similarly, Rule 9792.9.1(c)(3) provides that "Prospective or concurrent decisions to approve, modify, delay, or deny a request for authorization shall be made in a timely fashion that is appropriate for the nature of the injured worker's condition, not to exceed five (5) business days from the date of receipt of the completed DWC Form RFA."

The utilization review, in this case, was timely. As such, the court has no jurisdiction to undo it.

Defendant Cannot [Undo] an Approval under Utilization Review

A defendant is not permitted to disavow a Utilization Review determination that approves the requested treatment. LC §4610.5(f)(1). If there was a question about whether the treatment was appropriate or whether the medical necessity was causally connected to the injury, the defendant should have deferred the issue under LC §4610(I). Once the determination has been made the defendant must follow through. *Mata v. Supermercado Mi Tierra, LLC,* 2017 Cal. Wrk. Comp. P.D. Lexis 166[2]. "Defendant cannot both submit an RFA for a medical procedure to UR and then contend that it is not liable for the medical treatment that has been authorized by UR. The UR rules provide defendant with the opportunity to defer submission to UR of an RFA if it has an objection to the medical treatment on grounds other than medical necessity. But given that time is of the essence in medical treatment determinations, defendant is required to meet the specified timeframe if it contends that it has an appropriate objection to the requested medical treatment." *Id*, at p. 13.

Here, UR approved the RFA, so defendant must follow through. And then their purported objection to their own UR determination was untimely.

As such, the court lacks jurisdiction to void a specific approval of medical treatment by utilization review.

Once Utilization Review Has Made a Decision, the WCAB Cannot Unwind It by Deeming an RFA Invalid

According to the California Supreme Court in *Sandhagen, supra.,* the purpose of the UR legislation was to provide "quality, standardized medical care for workers in a prompt and expeditious manner". To allow a defendant, after the fact, to attack their own UR decision by going after the underlying RFA would completely contravene the principles outlined in *Sandhagen*.

In place of the often lengthy and cumbersome process employers used to dispute treatment requests prior to the passage of Senate Bill No. 228, the Legislature created a utilization review process that combines what are typically quick resolutions (§4610(g)(1)) with accuracy—employers can have their utilization review doctors review treatment requests, employers can seek additional time to obtain additional information or examinations (*id*., subd. (g)(5)), and medical review is required before the utilization review doctor can modify, delay, or deny a treatment request (*id*., subd. (e)). *Sandhagen, Supra* at 243-244.

[2] This case has not been designated as a significant panel decision, however it is very on point with the current situation.

Here, as with *Sandhagen*, Defendant is attempting to work around the law to get a second bite at the apple. Under §4610(g)(5), the defendant, if they had issues with the RFA, could have sought additional time to obtain additional information or examinations. They did not do so. The central issue for the utilization reviewer is whether the requested treatment is medically necessary (§4610(a)). This medical necessity determination is to be made after consulting the schedule for medical treatment utilization (§4610(g)(1), (h)), which is presumed to be correct on the issue of extent and scope of medical treatment (Lab. Code, § 4604.5(a)).

Defendant submitted the RFA to UR. UR determined that the request was medically necessary given the totality of all the information (applicant as an upper extremity amputee, with psychological trauma from a catastrophic injury who currently lives in a house that cannot be modified to accommodate his injuries). UR consulted the schedule for medical treatment utilization, found that there was no specific MTUS/ACOEM guideline. However, as it was not specifically in the guidelines, the reviewer did proceed to review peer-reviewed literature and determined the request to be appropriate. Jt. Exhibit 2, p. 7. UR then approved the request.

All the power resides in the hands of Defendant's UR in this process. Applicant, after the decision is made, can ask for IMR review. Defendant cannot.

Defendant's Contention That This Finding Creates a New Benefit is Specious

Under LC §4600, the treatment requested and approved is medically necessary to cure or alleviate the applicant's industrial injury in this case: amputation and PTSD from a catastrophic accident. Applicant cannot navigate his two story home given his orthopedic injuries and he is subject to re-traumatization each day because his current home overlooks the site of his horrible accident for which he has PTSD. Thus he requires a single story doweling that is not near the site of the accident in order to recover. This is no different than an applicant who requires residential placement in supportive care for a traumatic brain injury (*Zepeda v. Starview Adolescent Center*, 2022 Cal. Wrk. Comp. P.D. LEXIS 166[3]), or one requiring in-home healthcare because their injury limits their ability to attend to their personal needs. *Neri-Hernandez v. Workforce Staffing* (2014, *en banc*) 79 Cal. Comp. Cases 682. In fact, although not designated as a significant panel decision, in *Castillo v. Pedra's Machine Corp.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 119, the Board upheld

[3] Not a significant panel decision.

(with some modifications suggested by the WCJ) the basic ruling that CIGA had to provide applicant with a home.

Defendant Should be Sanctioned

The Defendant proceeded to trial in bad faith – frivolously trying to upend their own UR approval. Rule §10421 (b)(2) and (6)(A). They have compounded this conduct by putting forth an equally meritless Petition for Reconsideration. In the instant Petition for Reconsideration, further exacerbating their conduct, the Defendant does not cite to the record as required under CCR §10972(b)(1), and, although the Defendant cites various code sections, they offer no case law to support their interpretation of that law. LC §5813(a) provides that "the appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars ($2,500) to be transmitted to the General Fund."

CONCLUSION

For all the forgoing reasons the Petition for Reconsideration should be DENIED.

Further appropriate sanctions should be imposed for a frivolous and bad faith petition.

DATE: February 15, [2024]

Amy Britt

WORKERS' COMPENSATION JUDGE