WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ISAIAS SANCHEZ MANCILLA, ***Applicant***

vs.

CLS LANDSCAPE MANAGEMENT, INC.; INSURANCE COMPANY OF THE WEST, ***Defendants***

Adjudication Number: ADJ15315840
San Bernardino District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact issued on November 17, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a truck driver on July 16, 2021, applicant sustained injury arising out of and in the course of employment (AOE/COE) to his head, groin, psyche, left upper extremity, lower back, pelvis, left lower extremity, neck and right shoulder; (2) applicant is not entitled to home care pursuant to the January 3, 2023 stipulation; (3) applicant is not entitled to LVN treatment pursuant to the January 3, 2023 stipulation; (4) defendant was not required to demonstrate a change in applicant's condition in order to terminate home care or LVN treatment pursuant to the January 3, 2023 stipulation; (5) defendant was not required to comply with Labor Code section 4610 (i)(4)(c) or AD Rule 9792.9.1(e)(6) in order to terminate home care and LVN treatment pursuant to the January 3, 2023 stipulation; and (6) all remaining issues are moot.

Applicant contends that (1) the WCJ erroneously failed to find that defendant had an obligation to provide home care and LVN treatments after the expiration of the ninety-day period provided by the stipulation because the medical record does not show a change in his condition warranting their discontinuation; and (2) defendant violated Labor Code section 4610(i)(4)(c) and AD Rule 9792.9.l(e)(6) by failing to include home care and LVN treatments in applicant's discharge plan.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will grant

reconsideration, and, as our Decision After Reconsideration, we will rescind the Findings of Fact and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On June 29, 2023, the matter proceeded to trial as to the following issues:

> 1. Need for further medical treatment which consists of 28 hours a week of home health care and LVN care once a week.
> 2. Attorney fees.
> 3. Is there a material change in applicant's condition to warrant cessation of home health care and LVN care per existing case law including *Patterson vs. Oaks* and others.
> 4. Has the defendant complied with the discharge plan of Dr. Patterson pursuant to Labor Code Section 4610(i)(4)(c) and with Administrative Rule 9792.9.1(e)(6).
> (Minutes of Hearing (Reporter), June 29, 2023, p. 2:15-20.)

The WCJ admitted exhibits entitled Stipulation and Order dated January 3, 2023, and Report from Dr. Patterson dated January 18, 2023, into evidence. (*Id*., p. 2:24-3:5.)

The Stipulation and Order provides:

> 1. Defendant ICW and Applicant have resolved any and all Home Modifications issues, in full and final satisfaction, including any disputes concerning the prior August 3, 2022 "Stipulation Resolving the Home Modifications Dispute, Subject of the August 4, 2022, Expedited Hearing," as well as any and all alleged entitlements to any Penalties, Costs, Sanctions, Labor Code §5814 and/or Attorney Fees, as it solely relates to the Home Modifications issues.
>
> 2. As such, Defendant ICW will pay the sum total of $100,000.00, in full and final satisfaction, to the Applicant, within 30 days from the date of service on Defendants, of the Order Approving this Stipulation.
> . . .
> 5. Additionally, the parties agree that the above payment is contingent on the Applicant being discharged from the residential rehabilitation program at Casa Colina within the agreed upon timeframe of 30 days from the date of service of the Order Approving this fully executed Stipulation.
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> 6. Further, Defendant ICW will authorize the Applicant to be allowed to be enrolled in the Casa Colina day program for up to 90 days, 5 days per week, with a reevaluation by the PTP, Dr. Patterson, after 60 days to see if the full 90 days is necessary. Defendant to provide interpreting services and transportation services for the day program at Casa Colina.

7. Furthermore, Defendant ICW also agrees to pay a family member of the Applicant, $17.00 an hour, or hire an outside agency, for up to 28 hours per week of Home Care, for the same duration of time as per Paragraph 6 above.

8. Defendant also agrees to allow a once per week visit by an LVN to refill medications/pill box for the applicant.
(Ex. 5, Stipulation and Order, January 3, 2023, pp. 1:14-2:22.)

The Stipulation and Order was signed by applicant's attorney and defendant's attorney, and by the WCJ beneath the handwritten words "It is so ordered." (*Id.*, p. 3.)

The Report from Dr. Patterson dated January 18, 2023 consists of a Request for Authorization (RFA) for, among other things, "HHA 28 HOURS/WK X 90 DAYS" and "LVN 1 X PER WK X 90 DAYS" and twenty-one pages of accompanying materials. (Ex. 1, Report of Dr. Patterson, January 18, 2023, pp. 1-22.) The box on the form of the RFA indicating whether it is a new request is marked with an X. (*Id*., p. 1.) The RFA was faxed to defendant on January 18, 2023, and included a physician's note dated November 4, 2022, followed by an undated progress note for new orders as follows:

1. HHA 7 days per week 28 hrs per week x 90 days.
2. LVN 1 x per week x 90 days.
(*Id*., pp. 16-25.)

In the Report, the WCJ states:

[T]he Applicant was at Casa Colina on an inpatient basis. He was discharged from inpatient care. On January 3, 2023, the parties entered in a Stipulation and Order titled Stipulation Resolving the Home Modifications Issue in Full and Final Satisfaction and Order. Along with home modifications, the Defendant and Applicant stipulated to home healthcare services, and LVN services for a period of 90 days. There was also a stipulation for the Applicant to be enrolled in the Casa Colina day program for up to 90 days, five days per week, with a re-evaluation by Dr. Patterson, after 60 days to see if the full 90 days is necessary. (See Exhibit J-5)

The Defendant stipulated to provide home healthcare services for a period of 90 days. The Applicant's wife testified she was paid to provide home healthcare from January 27, 2023 through April 27, 2023. (See MOH/SOE September 7, 2023, p. 2 ll. 23–24) The Defendant, pursuant to the terms of the stipulations terminated payments for home healthcare service, and LVN care after the 90 day period expired.

The matter proceeded to trial. On November 17, 2023 a Findings of Fact issued which found the Applicant was not entitled to continued home healthcare or LVN care, the Defendant was not required to demonstrate a change in the Applicant's condition, nor was the Defendant required to comply with Labor Code §

4610(i)(4)(C) or 8 C.C.R. § 9792.9.1(e)(6) in order to terminate homecare or LVN care pursuant to the January 3, 2023 stipulation. It is from the Findings of Fact noted above that Applicant now seeks reconsideration.

. . .

Applicant asserts, based on *Patterson*, the Defendant may not unilaterally cease to provide home healthcare, or LVN care absent a showing of a change in the Applicant's circumstances, or a condition showing the medical treatment is no longer reasonably required to cure or relieve from the industrial injury. The present case is distinguishable from *Patterson*. The *Patterson* court stated, "[a]llowing a defendant to unilaterally cease reasonable medical treatment based only upon its subjective perception that the injured worker is a "difficult" person is inconsistent with the use of objective, evidence based standards to evaluate whether medical treatment is reasonable and necessary to cure or relieve from the effects of the industrial injury, as now provided in the workers' compensation statutes." (*Patterson v. Oaks Farms* (2014) 79 Cal. Comp. Cases 910 at 917.) In this case, unlike *Patterson*, the Defendant did not unilaterally terminate medical treatment on its own initiative. The decision to cease treatment of home healthcare and LVN care was based on the stipulations both parties signed on January 3, 2023. (See Exhibit J-5)

. . .

Both Labor Code section 4610(i)(4)(C) and Reg. 9792.9.1(e)(6) discuss requirements that shall be met prior to a concurrent review decision to deny or discontinue medical treatment. At the time medical treatment was terminated there was no concurrent utilization review in process, or a requesting physician with which to discuss terminating the medical treatment. In the instant case, the medical treatment was terminated pursuant to the stipulation the parties entered into on January 3, 2023.

It appeared to the undersigned that prior to the requirements of Labor Code section 4610(i)(4)(C) and Reg. 9792.9.1(e)(6) applying in this case, a RFA and subsequent utilization review were required. As there was no utilization review in progress, concurrent or otherwise, the Defendant could not comply with Labor Code section 4610(i)(4)(C) and Reg. 9792.9.1(e)(6). The undersigned did not find the requirements of Labor Code section 4610(i)(4)(C) and Reg. 9792.9.1(e)(6) applied in light of the specific facts in this case. The undersigned found since there was no concurrent utilization review which discontinued or denied medical treatment, Defendant had no obligation to comply with Labor Code section 4610(i)(4)(C), or Reg. 9792.9.1(e)(6).

(Report, pp. 1-5.)

DISCUSSION

We turn first to applicant's contention that the WCJ erroneously failed to find that defendant had an obligation to provide home care and LVN treatments after the expiration of the ninety-day period provided by the Stipulation because the medical record does not show a change in applicant's condition warranting their discontinuation.

As an initial matter, we note applicant's allegation that the Stipulation requires defendant to "provide 28 hours a week of home health care and 1 hour a week of LVN care for 90 days," and the WCJ's conclusion that defendant was not required by *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision)[1] to establish a change in applicant's condition warranting discontinuation of home care and LVN treatments because the ninety-day period for providing those treatments had expired. (Petition, pp. 6:27-7:2; Report, pp. 1-3.)

However, the Stipulation provides that defendant shall: (1) "pay a family member of the Applicant, $17.00 an hour, or hire an outside agency, for up to 28 hours per week of Home Care, for [90 days]"; and (2) "allow a once per week visit by an LVN to refill medications/pill box for the applicant." (Ex. 5, Stipulation and Order, January 3, 2023, pp. 1:14-2:22.) Thus, the Stipulation explicitly requires defendant to provide home care for a ninety-day period and to provide LVN care for an unstated, indeterminate period.

Because the WCJ misconstrued the Stipulation to require LVN treatment for ninety days, and because the WCJ found that defendant was not required to establish a change in applicant's condition in order to terminate LVN treatment on the grounds that the ninety-day period had expired, we conclude that the finding as to LVN treatment is without support.

In addition, we are unable to discern support for the finding that defendant was not required to provide home care and LVN treatments on the grounds that the ninety-day period had expired in the first instance because, regardless of whether or not the treatments were limited to ninety days, the record fails to show how, if at all, the treatments were requested or authorized.

Here, there is no evidence that applicant's physician (or any other person) raised the issue of home care and LVN treatments prior to the January 3, 2023 execution of the Stipulation. Rather, the record shows that the RFA was a "new request" for home care and LVN treatments—and that it was faxed to defendant on January 18, 2023. (Ex. 1, Report of Dr. Patterson, January 18, 2023, p. 1.) And, though a new order for home care and LVN treatments may have been

[1] Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

generated as early as November 4, 2022, there is no evidence it was communicated to defendant before January 18, 2023, much less before January 3, 2023. (*Id*., pp. 16-25.)

In addition, though the Stipulation memorializes a dispute regarding home modifications, it does not memorialize how, if all, the need for home care and LVN treatments was communicated to defendant before the parties agreed that those treatments would be provided. (Ex. 5, Stipulation and Order, January 3, 2023, pp. 1:14-2:22.) Nor does the Stipulation memorialize how, if at all, defendant investigated any claimed need for those treatments, "acknowledged the reasonableness and necessity of" the treatments, or otherwise authorized the treatments. (See *Patterson*, *supra*, at p. 918.)[2]

In other words, on this record we are unable to discern whether defendant authorized the treatments based upon prior communications with applicant's physician or attorney or agreed to home care and LVN treatments during discussions surrounding settlement of the home modification issue.

In this regard, we observe that *Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227 [35 Cal.Comp.Cases 383] states:

> Upon notice or knowledge of a claimed industrial injury an employer has both the right and *duty to investigate the facts* in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he *take the initiative in providing benefits*. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the effects of the industrial injury.
> (*Ramirez*, *supra*, at p. 234 [Emphasis added].)

In *United States Cas. Co. v. Industrial Acc. Com*. (*Moynahan*) (1954) 122 Cal.App.2d 427, [19 Cal.Comp.Cases 8], the court similarly states:

> Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury. . . . The duty imposed upon an employer who has notice of an injury to an employee is not...the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of his obligation and the needs of the employee.
> (*Moynahan*, *supra*, at p. 435.)

[2] We note that, though the Stipulation does not expressly authorize home care and LVN treatments, it may be construed to do so based upon the Stipulation's provision "authoriz[ing]" treatment at Casa Colina's day program.)

In *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc*. (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) (*Neri Hernandez*), we reiterated that "when an employer receives other notice that home health care services may be needed or are being provided, an employer has a duty under section 4600 to investigate." (*Neri Hernandez*, *supra*, at p. 695; see also *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd*. (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566] (*Braewood Convalescent Hosp*.).)

We also observe that defendant has a regulatory duty to conduct a reasonable and good faith investigation to determine whether benefits are due. Specifically, AD Rule 10109 provides, in relevant part:

> (a) [A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.
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> (b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.
>
> (1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information . . . The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.
>
> (2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.
>
> (c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.
> . . .
>
> (e) Insurers, self-insured employers and third-party administrations shall deal fairly and in good faith with all claimants, including lien claimants.
> (Cal. Code Regs., tit. 8, § 10109.)

This duty to perform a good faith investigation of an applicant's claim and provide benefits when due includes an obligation by defendant's attorney to transmit a copy of a request for treatment to the adjuster within a reasonable time when the request was received by the attorney and it is unclear whether it was received by the adjuster. (See *Czech v. Bank of Am*., (2016) 81 Cal.Comp.Cases 856.)

Hence, we conclude that the record should be developed as to (1) how, if at all, the need for home care and LVN treatments was communicated to defendant prior to the January 3, 2023 Stipulation; and (2) whether defendant met its obligation, if any, to investigate and provide those services by authorizing the treatments within the meaning of *Patterson* by way of the Stipulation.

In our view, if the developed record shows that the need for treatment was communicated, investigated, and authorized by defendant on or about January 3, 2023, then defendant would hold *Patterson's* burden of proving a change of applicant's condition warranting discontinuation of the treatments, irrespective of any time limitation attached to authorization. (See *Chavez v. Bonanza Concrete*, 2023 Cal. Wrk. Comp. P.D. LEXIS 258 (finding that the defendant holds the burden of establishing the occurrence of a change of circumstances or condition in order for the issue of the medical necessity of the treatment to be subject to discontinuation irrespective of whether or not time limitations were placed on the treatment authorization).)[3]

On the other hand, if the developed record shows that the parties included home care and LVN treatments as a tangential consideration for resolution of the home modification issue, then the parties are bound by the Stipulation's time limitation regarding home care.

Accordingly, we will return the matter to the trial level for further development of the record. (See *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [65 Cal.Rptr.2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal.Rptr.2d 898, 63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also § 5313.)

We next address applicant's contention that defendant violated Labor Code section 4610(i)(4)(c) and AD Rule 9792.9.l(e)(6) by failing to include home care and LVN treatments in applicant's discharge plan.

Here, the WCJ states in the Report that defendant was not required to comply with Labor Code section 4610 (i)(4)(c), or AD Rule 9792.9.1(e)(6) because home care and LVN treatments expired pursuant to January 3, 2023 Stipulation. (Report, p. 4.)

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[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we may consider these decisions to the extent that we find their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

But as we have explained, we are unable to discern grounds to support the WCJ's conclusion that the LVN treatment was subject to expiration, and the record is otherwise insufficient to determine the extent of defendant's obligation to provide home care and LVN treatments.

Accordingly, we conclude that the record should be further developed, as appropriate, as to the issue of whether home care and LVN treatments were properly subject to applicant's discharge plan, and, if so, whether defendant violated Labor Code section 4610 (i)(4)(c) or AD Rule 9792.9.1(e)(6).

Accordingly, we will rescind the finding that defendant was not required to comply with Labor Code section 4610 (i)(4)(c) or AD Rule 9792.9.1(e)(6) and return the matter to the trial level for further development of the record.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact issued on November 17, 2023 is **GRANTED**.

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued on November 17, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 12, 2024

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

ISAIAS SANCHEZ MANCILLA
BENTLEY & MORE
LAUGHLIN, FALBO, LEVY & MORESI

SRO/*cs*

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