

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

RUTH SERRANO, *Applicant*

vs.

**NOVA COMMERCIAL COMPANY, INC., and CYPRESS INSURANCE COMPANY,
administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

Adjudication Number: ADJ10746901

San Diego District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration and/or In The Alternative Petition For Removal (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration or removal of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on October 4, 2021, wherein the WCJ found in pertinent part that medical provider network - independent medical review (MPN-IMR) physician Michael D. Smith, M.D., could not address the cause of applicant's left hip condition, that the report from Dr. Smith could be sent to, and considered by, orthopedic qualified medical examiner (QME) G. Charles Roland, M.D., and that Dr. Roland shall address causation of applicant's left hip mass.

Applicant contends that the May 24, 2021, MPN-IMR report from Dr. Smith, which stated that left hip surgery was medically necessary, was adopted by the Administrative Director (AD) and should be ordered enforced; that orthopedic QME Dr. Roland cannot address the issue of causation regarding applicant's left hip mass; and that the May 24, 2021, report from Dr. Smith, as adopted by the AD, should not be sent to and/or reviewed by QME Dr. Roland.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the

F&O except that we will amend the F&O to find that the report from Michael D. Smith, M.D., is substantial evidence that applicant is in need of and is entitled to the left hip surgery as a diagnostic procedure (Finding of Fact #4); that Michael D. Smith, M.D., cannot address the medical need for the left hip surgery on an industrial basis (Finding of Fact #5); and that the report from Michael D. Smith, M.D., may not be sent to QME, Dr. Charles Roland for his review (Finding of Fact #6).

BACKGROUND

Applicant claimed injury to her lumbar spine, left hip, and left leg, while employed by defendant as a custodian on December 19, 2016. She underwent a course of treatment, including treatment for pain in her left hip. Applicant was evaluated by orthopedic QME Dr. Roland on June 1, 2017. The diagnoses included, “Abnormal apparent soft tissue mass noted at the anterolateral hip region; rule out neoplasm versus residual post-traumatic injury site without evidence of post-traumatic bursa.” (See App. Exh. 9, G. Charles Roland, M.D., December 4, 2018, p. 2, review of previous evaluation report.) Based on his December 4, 2018 re-evaluation of applicant, Dr. Roland stated that, “She requires immediate evaluation of the lateral hip mass to rule out pathology (i.e., sarcoma, etc.)” (App. Exh. 9, p. 17.) He later stated, “In addition to the continued evidence of lateral hip pain, she does have an expanding mass in my opinion at the anterolateral hip which should be biopsied and evaluated. I mentioned ... this on her prior visit to me in 2017.” (App. Exh. 9, p. 22.)

Applicant was initially seen by MPN treating physician Michael P. Muldoon, M.D., on March 5, 2018. (App. Exh. 1, Michael P. Muldoon, M.D., March 5, 2018.) She ultimately objected to the treatment she received from Dr. Muldoon, and she sought a second opinion evaluation pursuant to Labor Code section 4616.3 (c).¹ Jon P. Kelly, M.D., performed a second opinion evaluation regarding applicant’s left hip on April 3, 2019. (App. Exh. 5, Jon P. Kelly, M.D., April 3, 2019.) Applicant disputed Dr. Kelly’s opinions and she was seen by Ray L. Craemer, M.D., as the Labor Code section 4616.3 (c) “third physician” on October 16, 2019. (App. Exh. 6, Ray L. Craemer, M.D., October 16, 2019.)² Applicant’s treatment remained in dispute, and she requested a medical provider network (MPN) independent medical review (IMR). (Lab. Code, § 4616.4 (b).)

¹ Labor Code section 4616.3 (c) states: If an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician, the employee may seek the opinion of another physician in the medical provider network. If the injured employee disputes the diagnosis or treatment prescribed by the second physician, the employee may seek the opinion of a third physician in the medical provider network. (Lab. Code, § 4616.)

² All further statutory references are to the Labor Code unless otherwise noted.

On May 24, 2021, acting in the capacity of an MPN/IMR physician, Dr. Michael Smith evaluated applicant. In the “Case Summary” portion of his report, Dr. Smith stated:

I had been assigned to serve as the MPN-IMR physician, as outlined above, to specifically address the appropriate left hip diagnosis, whether such diagnosis would be industrially-caused, and if so, the appropriate treatment for such diagnosis, in conformity with the MTUS.
(Joint Exh. 103, Michael D. Smith, M.D., May 24, 2021, p. 8.)

The diagnoses were “Soft tissue mass left hip, probable lipoma (nonindustrial)” and “Lumbar radiculopathy status post lumbar spine surgery (2011 injury).” (Joint Exh. 103, Michael D. Smith, M.D., May 24, 2021, p. 47.) Regarding applicant’s medical treatment, Dr. Smith stated, “The patient needs to go to LAC/USC Hospital or privately to have excision of lipoma, left hip, by an orthopaedic oncologist on a nonindustrial basis.” (Joint Exh. 103, p. 47.) The AD adopted Dr. Smith’s May 24, 2021 report on June 7, 2021. (Joint Exh. 104, George Parisotto, June 7, 2021, Adoption of Medical Provider Network Independent Medical Review Determination.)

The parties proceeded to trial on August 9, 2021, and they stipulated that applicant, “sustained injury arising out of and in the course of employment to her left leg, left hip, and lumbar spine.” (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 9, 2021, p. 2.) The issues submitted for decision were: whether the report by MPN-IMR physician Dr. Smith could be sent to QME Dr. Roland; whether the MPN-IMR doctor could address the causation of the left hip mass; whether the MPN-IMR doctor could address the medical need for surgery of the left hip mass, on an industrial basis; and whether the left hip surgery addressed by the AD on June 7, 2021, may be ordered by the Appeals Board. (MOH/SOE, pp. 2 – 3.)

DISCUSSION

We first note that pursuant to section 4616.4:

(b) If, after the third physician's opinion, the treatment or diagnostic service remains disputed, the injured employee may request an MPN independent medical review regarding the disputed treatment or diagnostic service still in dispute after the third physician's opinion in accordance with Section 4616.3. The standard to be utilized for an MPN independent medical review is identical to that contained in the medical treatment utilization schedule established in Section 5307.27. ...

(e) Upon receipt of information and documents related to the application for an MPN independent medical review, the MPN independent medical reviewer shall

conduct a physical examination of the injured employee at the employee's discretion. The MPN independent medical reviewer may order any diagnostic tests necessary to make his or her determination regarding medical treatment. ... (Lab. Code, § 4616.4.)

The language of section 4616.4 (b) is quite clear that an MPN/IMR evaluation pertains only to “disputed treatment or diagnostic service still in dispute.” Therefore, the MPN-IMR physician is not to address the cause of the injured worker’s condition. (See *Simmons v. State of California, Department of Mental Health* (2005) 70 Cal.Comp.Cases 866 (Appeals Board en banc).) As noted above, in his report Dr. Smith stated that the issues he was told to address included whether applicant’s left hip condition was “industrially caused.” (Joint Exh. 103, p. 8.) The doctor’s statement is inconsistent with the limitations of the issues to be addressed as identified in section 4616.4 (b). Thus, his opinion that applicant’s left hip soft tissue mass/lipoma is “nonindustrial” and should be treated “on a nonindustrial basis” is not evidence and will not be considered. However, his opinion that applicant should undergo an excision/biopsy of the left hip mass/lipoma is consistent with the diagnosis of “probable lipoma.” Clearly the excision/biopsy is a diagnostic procedure, necessary to determine the nature of, and the proper medical treatment for, the left hip soft tissue mass. The doctor’s report constitutes evidence that the excision/biopsy is a necessary diagnostic test regarding the actual nature of applicant’s left hip condition.

Next, regarding the issue of whether QME Dr. Roland should review and consider the report from Dr. Smith, DIR rule 35.5 states:

For any evaluation performed on or after July 1, 2013, and regardless of the date of injury, an Agreed Medical Evaluator or Qualified Medical Evaluator shall not provide an opinion on any disputed medical treatment issue, but shall provide an opinion about whether the injured worker will need future medical care to cure or relieve the effects of an industrial injury. (Cal. Code Regs., tit. 8, § 35.5 (g) (2); underlining added.)

As discussed above, the proper subject for Dr. Smith to address was whether applicant should undergo the left hip surgery she was requesting. He clearly stated that applicant should have excision/biopsy of the left hip lipoma. (Joint Exh. 103, p. 47.) That is a disputed medical treatment issue and as such cannot be addressed by QME Dr. Roland. Based thereon, there is no reason to have Dr. Roland review Dr. Smith’s report.

Finally, the Appeals Board has determined that a utilization review decision is invalid and not subject to independent medical review only if it is untimely, and the legal issues regarding timeliness of a utilization review decision must be resolved by the Appeals Board. However, all other disputes regarding a utilization review decision must be resolved by independent medical review. (*Dubon v. World Restoration, Inc.* (2015) 79 Cal. Comp. Cases 1298 (Appeals Board en banc).) Our review of the record indicates that there is no dispute as to the timeliness of the utilization review decision so an independent medical review was the proper procedure for addressing the issue of applicant's medical treatment. We noted earlier that the AD adopted Dr. Smith's May 24, 2021 MPN/IMR report which stated that applicant should undergo an excision/biopsy of the left hip mass/lipoma. (Joint Exh. 104; Joint Exh. 103, p. 47.)

Section 4610.6 states in part:

(a) Upon receipt of a case pursuant to Section 4610.5, an independent medical review organization shall conduct the review in accordance with this article and any regulations or orders of the administrative director. The organization's review shall be limited to an examination of the medical necessity of the disputed medical treatment. ...

(g) The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties.

(h) A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:

(1) The administrative director acted without or in excess of the administrative director's powers.

(2) The determination of the administrative director was procured by fraud.

(3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.

(4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.

(5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

(i) ... In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization. (Lab. Code, § 4610.6.)

Here, neither party appealed the AD's determination (by his adoption of the MPN/IMR report) that applicant was in need of the left hip excision/biopsy surgery. The AD's determination is presumed correct and the Appeals Board, including the WCJ, cannot make a "determination of medical necessity" that is inconsistent with the AD's determination. Based thereon, applicant is in need of, and in turn, entitled to the left hip surgery at issue herein.

Accordingly, we affirm the F&O except that we amend the F&O to find that the report from Michael D. Smith, M.D., is substantial evidence that applicant is in need of and is entitled to the left hip surgery as a diagnostic procedure; that Michael D. Smith, M.D., cannot address the medical need for the left hip surgery on an industrial basis; and that the report from Michael D. Smith, M.D., may not be sent to QME, Dr. Charles Roland for his review.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 4, 2021 Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The report from Dr. Michael Smith is substantial evidence that applicant is in need of and is entitled to the left hip surgery as a diagnostic procedure; Dr. Michael Smith cannot address causation as to applicant's left hip injury.

5. Michael D. Smith, M.D., cannot address the medical need for the left hip surgery on an industrial basis.

6. The report from Michael D. Smith, M.D., may not be sent to QME, Dr. Charles Roland for his review.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2024

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

**RUTH SERRANO
MCLAUGHLIN & SANCHEZ, APC
LAW OFFICES OF HARRIGAN POLAN KAPLAN & BOLDY**

TLH/mc

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