

**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**SACRAMENTO SANTANA**

**vs.**

**HOUSE FOODS AMERICA CORPORATION; TOKIO MARINE INSURANCE  
COMPANY, *Defendants***

**Adjudication Number: ADJ14943245  
Van Nuys District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on February 5, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a production worker on June 24, 2021, applicant sustained injury to the head, and claims to have sustained injury to the brain, back, nervous system, eyes, neck, lower extremities and psyche; (2) the parties stipulated that the August 31, 2023 Utilization Review (UR) determination was timely; (3) *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision)<sup>1</sup> is inapplicable to the issue of whether applicant is entitled to continued outpatient rehabilitation treatment at Centre for Neuro Skills Day Treatment Center (CNS); and (4) the WCJ lacks jurisdiction to determine whether applicant is entitled to continued outpatient treatment at CNS.

The WCJ ordered the matter off calendar.

Applicant contends that the WCJ erroneously failed to find that (1) *Patterson* is applicable to the issue of whether applicant is entitled to continued outpatient treatment at CNS; and (2)

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<sup>1</sup> Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel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).)

defendant failed to meet its burden of proving the occurrence of a change in applicant's circumstances or condition warranting discontinuation of outpatient treatment at CNS.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be dismissed as untimely or denied on the merits.

We have reviewed the Petition for Reconsideration, 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 F&O and substitute findings that *Patterson* is applicable to the issue of whether applicant is entitled to continued outpatient treatment at CNS, that defendant failed to meet its burden of proving the occurrence of a change in applicant's circumstances or condition warranting discontinuation of the treatment, and that applicant is entitled to continued outpatient treatment at CNS in the absence of a showing of a change in circumstances or condition warranting its discontinuation.

### **FACTUAL BACKGROUND**

On January 11, 2024, the matter proceeded to trial of the following relevant issues:

1. Does the WCAB have jurisdiction in this case.
2. If so, whether Defendant properly terminated the medical treatment at CNS Day Treatment Center, per Patterson.  
(Minutes of Hearing, January 11, 2024, p. 2:17-18.)

The WCJ admitted exhibits entitled Utilization Review Authorization dated April 6 2023, Initial Conference Summary for Centre for Neuro Skills dated August 18, 2023, RFA for Continued Day Treatment from Kevin Kohan, D.O. dated August 23, 2023, and UR Denial from Zenith dated August 31, 2023. (*Id.*,

The Utilization Review Authorization dated April 6, 2023 states:

#### **REVIEW DETERMINATION**

**Diagnosis:** Traumatic Brain Injury

**Request:** Referral to Comprehensive Rehabilitation Center for continuous monitoring

**Recommendation:** Approval

...

**Approval Start and End Dates:**

04/06/2023-08/06/2023

...

In this case, the claimant presents with pain in the neck and shoulder rated 3/10. It is noted that the claimant has had a history of psychiatric concerns since their injury, and they have been having headaches, forgetfulness, and confusion. The provider states it causes the claimant difficulty in maintaining their appointments, and it is becoming difficult to treat the claimant. They state that the claimant requires continuous monitoring and recommend the claimant to be evaluated at a rehabilitation facility such as Cosa Colina. Per the documentation, the claimant has trialed numerous treatments with an unsure subjective response to treatment as they are a poor history. Pertinent information reveals that the referral to comprehensive rehabilitation center for continuous monitoring does not list a duration/length of time. Since the provider recommended an evaluation, there is a combination of significant subjective and objective findings to establish the medical necessity of this request, and the recommendation for referral to comprehensive rehabilitation center for continuous monitoring is for certification.  
(Ex. 1, Utilization Review Authorization, April 6, 2023, pp. 1-2.)

The Initial Conference Summary for Centre for Neuro Skills dated August 18, 2023 states:

**PERIOD COVERED:** July 31 - August 18, 2023

**CURRENTLY AUTHORIZED UNTIL/FOR:** August 25, 2023

**REQUEST FOR AUTHORIZATION:**

extended authorization for day treatment, 30 treatment days, to be completed between August 28 - October 6, 2023, at five days per week

...

**EXPLANATION FOR LEVEL OF CARE:**

Sacramento requires ongoing, medically necessary day treatment programming due to the following:

counseling to provide brain injury education, increase insight into deficits and improve adjustment to disability, and address symptoms of anxiety and depression  
physical therapy to address lower extremity strength, coordination, cervical range of motion, balance, and endurance, to enhance his safety with household and community ambulation

occupational therapy to address upper extremity strength, coordination, and range of motion, to promote participation in instrumental activities of daily living

speech/cognitive therapy to address attention, memory, executive function, and language, to promote ability to recall, process, problem solve, and follow directions, especially in an emergency

educational therapy to address reading comprehension, writing, math, and money management skills, necessary for daily activities

(Ex. 8, Initial Conference Summary for Centre for Neuro Skills, August 18, 2023, pp. 1-2.)

The RFA for Continued Day Treatment from Kevin Kohan, D.O. dated August 23, 2023 states:

Service/Good Requested

...

Day Treatment Program at the Centre for Neuro Skills, including physical therapy, occupational therapy, speech therapy, educational therapy, and counseling

...

Other Information

...

30 treatment days, at 5 days/week, 4 hours/day, beginning August 29, 2023  
(Ex. 9, RFA for Continued Day Treatment from Kevin Kohan, D.O., August 23, 2023, p. 1.)

The UR Denial from Zenith dated August 31, 2023 states:

**Recommendation:** Adverse Determination

...

**Decision Summary:** . . .

In this case, the claimant has severe depression, severe anxiety, and decreased cervical range of motion. The physical examination shows decreased memory, a decrease in response time from 4.34 minutes to 1.20 minutes, and an increase in verbal direction following. They have decreased bilateral shoulder range of motion, decreased bilateral hip extension, and decreased left ankle plantar flexion, dorsiflexion, and inversion. They have decreased right ankle dorsiflexion as well as cervical range of motion. They have decreased bilateral scapular, shoulder, elbow, forearm, wrist, fingers, thumb, hip, knee, and ankle strength. The claimant has impaired sensation in the left upper extremity. It is important to note that the encounter note provided states that period coverage is from 07/31/2023 to 08/18/2023. The documentation highlights that the program is currently authorized until 08/25/2023. While the documentation highlights improvements in cognitive areas from previous participation in a program, including orientation, task initiation, attention, and command following, the documentation does not highlight improvements in terms of range of motion and strength to support the need for physical or occupational therapy. Additionally, the documentation highlights that the program is currently authorized until 08/25/2023, and the period reviewed was from 07/31/2023 to 08/18/2023. However, the documentation does not provide functional improvements from the remaining week of the authorized program to support the request. The medical necessity of the request cannot be established at this time. The recommendation for day treatment program at Centre for Neurological Skills: PT, OT, ST, education therapy and counseling 30 treatment days 5 days/week 4 hours/day beginning 8/29/23 is for non-certification.

(Ex. 10, UR Denial from Zenith dated August 31, 2023, pp. 1-2.)

The F&O was served upon the parties in the Official Address of Record, including as follows:

SACRAMENTO SANTANA                  Injured Worker, PO BOX 6877  
    SANTA ANA CA 92706

...

TOKIO MARINE PASADENA              Claims Administrator, PO BOX 483  
    JERSEY CITY NJ 07303

(F&O, p. 7.)

In the Report, the WCJ states:

The proof of service shows that the petition was served on 3/01/2024, however it was not filed before 5:00 p.m. on that day with the WCAB Filenet in EAMS shows that the document entry date was on 3/04/2024 and the petition was not deemed received until 3/02/2024. The petition for reconsideration was not timely and should be dismissed. Nevertheless, the undersigned will address the merits.

(Report, p. 2.)

## DISCUSSION

A petition for reconsideration must be filed and received by the Appeals Board within twenty days of the service of the final order (plus an additional 10 calendar days if service of the decision is by any method other than personal service, including by mail, upon an address outside of California but within the United States. (Labor Code § 5903<sup>2</sup>; Cal. Code Regs., tit. 8, § 10605(a)(2).)

Although applicant received service of the decision within California, defendant Tokio Marine was served by mail to an address in New Jersey. (F&O, p. 7.) Therefore, the time for filing the Petition is extended by 10 days in order to ensure due process to all the served parties. (See *Mayfield v. Walmart, Inc.*, 2022 Cal.Wrk.Comp. P.D. LEXIS 120.)<sup>3</sup> Since applicant filed the Petition on March 2, 2024, twenty-six days after the February 5, 2024 issuance of the F&O, we conclude that the Petition is timely. (Report, p. 2.) Accordingly, we will address its merits.

Applicant first contends that the WCJ erroneously failed to find that *Patterson* is applicable to the issue of whether applicant is entitled to continued outpatient treatment at CNS. In that case,

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<sup>2</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

<sup>3</sup> Though not binding, we may consider Appeals Board panel decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)

the Appeals Board held that an employer may not unilaterally cease to provide treatment authorized as reasonably required to cure or relieve the effects of industrial injury upon an employee without substantial medical evidence of a change in the employee's circumstances or condition. The panel reasoned:

Defendant acknowledged the reasonableness and necessity of [the medical treatment at issue] when it first authorized [that treatment], and applicant does not have the burden of proving [its] ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the [treatment] is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization [RFA] and starting the process over again.  
(*Patterson, supra*, at p. 918.)

In *Nat'l Cement Co., Inc. v Workers' Comp. Appeals Bd. (Rivota)* (2021) 86 Cal.Comp.Cases 595, the Second District Court of Appeal upheld the Appeals Board's application of *Patterson* to award an applicant continued inpatient care at Casa Colina, stating:

[T]he principles advanced in [*Patterson*] apply to other medical treatment modalities as well. Here . . . Applicant had continued need for placement at Casa Colina. Further, [applicant's witness] stated that there was no change in Applicant's circumstance and no reasonable basis to discharge Applicant from care. The WCJ . . . concluded that Applicant's continued care at Casa Colina was necessary, without ongoing RFAs, to ensure Applicant's safety and provide him with a stable living situation and uninterrupted medical treatment.  
(*Rivota, supra*, at p. 597.)

In upholding this application of *Patterson*, the *Rivota* court rejected the employer's attempt to distinguish it on the grounds that it had never authorized inpatient care for an unlimited or ongoing period, never relinquished its right to conduct UR, and never been subject to a finding that inpatient treatment was reasonable and necessary for the applicant under section 4600. (*Id.*)

In the present case, the record shows that applicant's physician initially requested that applicant be referred to the Comprehensive Rehabilitation Center for inpatient care in the form of "continuous monitoring." (Ex. 1, Utilization Review Authorization, April 6, 2023, pp. 1-2.) The request did "not list a duration/length of time," but defendant authorized the request for the period from April 6, 2023 until August 6, 2023. (*Id.*)

Although the record does not show how it was requested, defendant subsequently authorized applicant to receive outpatient rehabilitation care at CNS for a period beginning from

July 31, 2023 to August 25, 2023. (Ex. 10, UR Denial from Zenith dated August 31, 2023, pp. 1-2.)

Because defendant authorized treatment in the form of outpatient rehabilitation care at CNS, we conclude that *Patterson* is applicable to the issue of whether applicant is entitled to continued treatment there. (See also *Zepeda v. Starview Adolescent Center* (2022) 87 Cal.Comp.Cases 828 (holding that a physician's request to continue the applicant's previously-authorized inpatient treatment was not subject to UR because there was no substantial medical evidence of change in applicant's circumstances or condition as required by *Patterson*).) Accordingly, we will substitute a finding that *Patterson* is applicable to the issue of whether applicant is entitled to continued outpatient treatment at CNS.

Applicant further contends that the WCJ erroneously failed to find that defendant failed to meet its burden of proving the occurrence of a change in applicant's circumstances or condition warranting discontinuation of outpatient treatment at CNS.

Here, on August 23, 2023, applicant's physician requested that outpatient rehabilitation treatment at CNS be continued for six additional weeks, seeking "30 treatment days, at 5 days/week, 4 hours/day, beginning August 29, 2023." (Ex. 9, RFA for Continued Day Treatment from Kevin Kohan, D.O., August 23, 2023, p. 1.)

On August 31, 2023, defendant denied the request, stating that the "medical necessity of the request cannot be established at this time" because the medical record did not show "functional improvements from the remaining week of the authorized program." (Ex. 10, UR Denial from Zenith dated August 31, 2023, pp. 1-2.)

Notably, the grounds cited for denying the request do not rely on any claim that applicant experienced a change of circumstances or condition warranting discontinuation of the previously-authorized treatment. Rather, the denial asserts that applicant failed to show the medical necessity of the treatment because he lacked documentation showing improvement over the last week before authority for the treatment expired.

But we have explained that defendant may not impose upon applicant the burden of proving the ongoing medical necessity of previously-authorized treatment—and it is defendant's burden to prove that continued provision of the treatment is no longer medically necessary based upon a change of applicant's condition or circumstances. (*Patterson, supra*, at p. 918.) Additionally, the expiration of a time-limitation attached to the authorization may not serve as grounds for

discontinuation of the treatment where defendant has not met its burden of proof. (See *Rivota*, *supra*, at p. 597.)

Hence we conclude that the WCJ erroneously failed to find that defendant failed to meet its burden of proving the occurrence of a change in applicant's circumstances or condition warranting discontinuation of outpatient treatment at CNS.

Accordingly, we will substitute findings that defendant failed to meet its burden of proving the occurrence of a change in applicant's circumstances or condition warranting discontinuation of the treatment, and, in the absence of such a showing, applicant is entitled to continued outpatient treatment at CNS.

Accordingly, we will rescind the F&O and substitute findings that *Patterson* is applicable to the issue of whether applicant is entitled to continued outpatient treatment at CNS, that defendant failed to meet its burden of proving the occurrence of a change in applicant's circumstances or condition warranting discontinuation of outpatient treatment at CNS, and that applicant is entitled to continued outpatient treatment at CNS in the absence of a showing of a change in circumstances or condition warranting its discontinuation.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings of Fact and Order issued on February 5, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration, that the Findings of Fact and Order issued on February 5, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. SACRAMENTO SANTANA, born on \_\_\_\_\_, while employed on June 24, 2021 as a production worker at Garden Grove, California, by HOUSE FOODS AMERICA CORPORATION, whose workers' compensation insurance carrier was Tokio Marine America Insurance Company c/o Tokio Marine America, sustained injury arising out of and occurring in the course of employment to the head and claims to have sustained injury arising out of the course and scope of employment to brain, back, nervous system, eyes, neck, lower extremities and psyche.



2. The parties stipulated that the August 31, 2023 Utilization Review (UR) determination was timely.
3. *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision) is applicable to the issue of whether applicant is entitled to continued outpatient rehabilitation treatment at Centre for Neuro Skills (CNS).
4. Defendant failed to meet its burden of establishing the occurrence of a change of circumstances or condition warranting discontinuation of applicant's outpatient rehabilitation treatment at CNS.
5. Applicant is entitled to continued outpatient rehabilitation treatment at CNS in the absence of a showing of change of circumstances or condition warranting discontinuation of the treatment.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

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

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**MAY 3, 2024**

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

**SACRAMENTO SANTANA  
TINA ODJAGHIAN LAW GROUP  
TOBIN LUCKS**

**SRO/cs**

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