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

**FILIBERTO CUELLAR,** ***Applicant***

**vs.**

**THE HABIT BURGER; CORVEL CORPORATION;**
**administered by ZURICH NORTH AMERICA,** ***Defendants***

**Adjudication Number: ADJ13001939**
**Riverside District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Zurich North America seeks reconsideration of the October 9, 2024 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a cook on September 9, 2019, sustained industrial injury to his lumbar spine, thoracic spine, and neurogenic bowel, and claimed injury to his right knee, right ankle, psyche and internal system. The WCJ found that as a result of applicant's admitted injury, defendant authorized home healthcare commencing July 8, 2022, and continuing through June 17, 2024, and that there had been no change in applicant's condition. Accordingly, the WCJ ordered defendant to continue to provide home health services.

Defendant contends that its utilization review (UR) determination is binding on the parties, and that applicant's only recourse is Independent Medical Review.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

## FACTS

Applicant claims to have sustained injury to his low back, thoracic spine, neurogenic bowel, right knee, right ankle, psyche and internal systems, while employed as a cook by defendant Hamburger Habit on September 9, 2019. Defendant admits injury to the low back, thoracic spine, and neurogenic bowel, but disputes injury to the right knee, right ankle, psyche and internal systems.

Applicant has selected Kenneth Wogensen, M.D., as his primary treating physician (PTP).

In July, 2022, defendant authorized home health services to applicant six hours per day, seven days per week. (Minutes of Hearing and Summary of Evidence (Minutes), dated August 20, 2024, at p. 4:1; Petition for Reconsideration (Petition), dated October 31, 2024, at p. 2:8.)

On January 19, 2024, Dr. Wogensen issued a workers' compensation progress note, in which applicant was diagnosed with, *inter alia*, a thoracic spine injury with disc herniation, lumbosacral spine injury with disc herniation, reduced sensation below the abdomen extending into the legs, weakness in both lower extremities, progressive weakness right arm more than left, and tremors in the right lower extremities. (Ex. 5, Progress Report of Kenneth Wogensen, M.D., dated January 19, 2024, at p. 1.) It was noted that applicant had both bowel and bladder incontinence and was using a wheelchair. (*Id.* at p. 2.) Dr. Wogensen described a continued plan of treatment that continued to recommend home health care 6 hours per day, seven days per week. (Ibid.)

On May 31, 2024, Dr. Wogensen issued a workers' compensation progress note reiterating his prior diagnoses, noting that applicant continued to experience incontinence and was using a wheelchair. (Ex. 2, Progress Report of Kenneth Wogensen, M.D., dated May 31, 2024, at p. 1.)

On June 4, 2024, Dr. Wogensen submitted a Request for Authorization (RFA), seeking in relevant part continued home health care services, six hours per day, seven days per week. (Ex. 6, RFA, dated June 4, 2024, at p. 1.)

On June 17, 2024, defendant's UR provider issued a decision non-certifying the request for home health care as not medically necessary. (Ex. A, UR Modification, dated June 17, 2024, at p. 1.)

On July 19, 2024, Dr. Wogensen issued a workers' compensation progress note, reiterating his prior diagnoses, and again requesting home health care services 6 hours per day, 7 days per week. (Ex. 1, Progress Report of Kenneth Wogensen, M.D., dated July 19, 2024.)

On August 5, 2024, defendant's UR provider issued a decision non-certifying the request for home health care services. (Ex. B, UR Modification, dated August 5, 2024, at p. 1.)

On August 20, 2024, the parties proceeded to trial, framing for decision the issue of "whether applicant is entitled to and in need of continued home care services six hours a day and seven days a week." (Minutes, at p. 2:16.) The WCJ heard applicant's testimony, and ordered the matter submitted for decision the same day.

On October 8, 2024, the WCJ issued the F&O, determining in relevant part that "[a]s a result of said injury applicant's medical condition has continued without evidence of improvement or change of circumstance, and with continuing home healthcare necessary." (Finding of Fact No. 3.) The WCJ ordered defendant to continue to provide home health care services from June 17, 2024 through the present and continuing, "absent a showing of change of circumstance." (F&O, Order, dated October 8, 2024.) The WCJ's Opinion on Decision noted that pursuant to *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 [2014 Cal. Wrk. Comp. P.D. LEXIS 98] (*Patterson*) (significant panel decision),[1] "once home healthcare has been authorized applicant has no obligation to continually show that services are reasonable and necessary … [r]ather the burden shifts to defendant to show such services are no longer necessary." (Opinion on Decision, at p. 4.)

Defendant's Petition contends the evidence does not justify the Award continuing the applicant's home health care services. (Petition, at p. 3:3.) Defendant contends that the instant matter is distinguishable from *Patterson, supra*, 79 Cal.Comp.Cases 910, because in *Patterson* the defendant unilaterally discontinued medical treatment, whereas in the instant matter, UR determined that the requested home health care services were not medically necessary. (*Id.* at p. 3:11.) Defendant contends that pursuant to Labor Code[2] section 4610.5, applicant's recourse from an adverse utilization review determination is limited to Independent Medical Review (IMR), and that the court was without jurisdiction to decide the instant medical treatment dispute. (*Id.* at p. 3:23.)

Applicant's Answer asserts that the burden of proving a change in applicant's medical condition or circumstance rests with the defendant, and that once home health care services are

[1] A significant panel decision is a decision of the Appeals Board that has been designated by all members of the Appeals Board as of significant interest and importance to the workers' compensation community. Although not binding precedent, significant panel decisions are intended to augment the body of binding appellate and en banc decisions by providing further guidance to the workers' compensation community. (Cal. Code Regs., tit. 8, § 10305(r).)

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

authorized, the burden shifts to the defendant to show that these services are no longer necessary. Applicant contends defendant has not met this burden. (Answer, at p. 2:6.)

The WCJ's Report notes that the evidentiary record does not support a change in applicant's condition or circumstance, and as such, recommends that we deny reconsideration. (Report, at p. 3.)

## DISCUSSION

### I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 12, 2024, and 60 days from the date of transmission is Saturday, January 11, 2025. The next business day that is 60 days from the date of transmission is Monday, January 13, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Monday, January 13, 2025, so that we have timely acted on the petition as required by section 5909(a).

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 12, 2024 and the case was transmitted to the Appeals Board on November 12, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 12, 2024.

**II.**

Section 4600(a) provides that an industrially injured worker is entitled, at their employer's expense, to medical treatment that is reasonably required to cure or relieve the effects of the industrial injury. (§ 4600(a).) The coverage of section 4600 extends to any medically related services that are reasonably required to cure or relieve the effects of the industrial injury, even if those services are not specifically enumerated in that section. (*Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 41 [49 Cal.Comp.Cases 454].)

In *Patterson*, *supra*, 79 Cal.Comp.Cases 910, 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

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Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

> condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization and starting the process over again.
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> (*Patterson, supra*, at p. 918.)

In *National Cement Co. 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, 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.
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> (*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, had never relinquished its right to conduct UR, and had never been subject to a finding that inpatient treatment was reasonable and necessary for the applicant under section 4600. (*Id*.)

In *Los Angeles County MTA v. Workers' Comp. Appeals Bd.* (*Burton*) 89 Cal.Comp.Cases 977 [2024 Cal. Wrk. Comp. LEXIS 55] (writ denied), applicant challenged defendant's Utilization Review non-certification of ongoing inpatient treatment, on the grounds that there had been no demonstrable change in applicant's condition such that a new Utilization Review determination was appropriate and necessary. The WCJ agreed and determined that applicant was entitled to continue her inpatient rehabilitation treatment until such time as defendant could establish a change in circumstance. The WCJ noted that "the whole point of *Patterson* is that a Form RFA is not required in certain circumstances involving care of an ongoing nature … [t]he decision is about when an RFA is required, and if one is not required in the first place, then there can be no valid UR therefrom, timely or otherwise." (*Id.* at p. 980.) Thus, defendant's submission of the RFA to UR was invalid without a precipitating change in circumstance. The Appeals Board denied defendant's Petition for Reconsideration without further comment, and defendant's subsequent petition for writ of review was denied by the Second District Court of Appeal and the Supreme

Court. (See *Los Angeles County MTA v. Workers' Comp. Appeals Bd.* (2024) 2024 Cal. LEXIS 6103.)

In the present matter, applicant's primary treating physician has recommended home health care services six hours per day, seven days per week since June, 2022. Over the following two years, PTP Dr. Wogensen has submitted periodic requests for continuing authorization for home healthcare, and defendant has authorized those requests through June, 2024. (Minutes, at p. 5:1; Petition, at p. 2:5.)

Following Dr. Wogensen's June 4, 2024 RFA for home health services, however, defendant submitted the request to UR, and on June 17, 2024, defendant's UR provider non-certified the request. (Ex. A, UR Modification, dated June 17, 2024, at p. 1.)

On July 19, 2024, Dr. Wogensen again submitted an RFA requesting home health services. And on August 5, 2024, defendant's UR provider again issued a decision non-certifying the request. (Ex. B, UR Modification, dated August 5, 2024, at p. 1.)

Thus, following approximately two years of authorizing home health services, and without an identified change in medical condition or circumstance, defendant declined to reauthorize home health services and instead submitted the PTP's June 4, 2024 request for ongoing services to UR, which non-certified the request. Pursuant to our analysis in *Patterson*, *supra*, 79 Cal.Comp.Cases 910, however, where a medical treatment authorized pursuant to section 4600(a) is determined to be medically necessary, defendant is obligated to continue providing that treatment until such time as there is a material change in circumstance. (*Id.* at p. 918.) We further noted that defendant cannot shift its burden onto applicant by requiring a new RFA and starting the process over again. (*Ibid*.)

Applying our reasoning in *Patterson* to the present matter, we observe that applicant's need for home health services was originally recommended by his PTP in June, 2022, and that defendant authorized those services pursuant to its obligations under section 4600(a) until June 17, 2024. Defendant thus received and reviewed Dr. Wogensen's request for the provision of home health services beginning in June, 2022, and agreed to authorize those services as medically necessary.

The process of an employer or carrier internally reviewing a request for medical treatment and authorizing that treatment as medically necessary is *functionally equivalent* to an external utilization review process. (See Lab. Code, § 4610(a) ["'utilization review' means utilization review or utilization management functions that prospectively, retrospectively, or concurrently review and approve, modify, or deny, based in whole or in part on medical necessity to cure and

relieve, treatment recommendations by physicians … prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600."].) Indeed, as the California Supreme Court has observed in *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 244 [73 Cal.Comp.Cases 981], even though a defendant decides to review and approve a treatment request without resort to external utilization review, the defendant has *nonetheless accomplished a utilization review*. (*Id.* at p. 244 ["when the employer [internally] reviews the request and determines that treatment is reasonably required, the employer has engaged in utilization review"].)

Thus, defendant's authorization of two years of home health services was a function of utilization review and was based on the medical necessity of the services provided pursuant to section 4600. Pursuant to our analysis in *Patterson*, any change to the established need for medical treatment would necessarily involve a change in applicant's condition or circumstance, such that a renewed review of the medical necessity of the requested treatment was appropriate and indicated. As the party with the affirmative of the issue, defendant would bear the burden of establishing the existence of a material change in applicant's medical condition or circumstance. (Lab. Code, § 5705.)

Here, we agree with the WCJ that defendant has not carried that burden. Defendant offers no medical reporting to establish a material change in applicant's condition that would otherwise necessitate a reevaluation of a medically necessary treatment modality. (Report, at p. 3.) We also observe that the PTP reporting in evidence from Dr. Wogensen demonstrates consistent symptoms and diagnoses, without substantive change to the frequency or amount of home health care services prescribed. (Exs. 1-5, Reports of Kenneth Wogensen, M.D., various dates.)

Although we affirm the WCJ's determination that defendant has not met its burden of proof, we also note that "pre-trial discovery is desirable and beneficial," and that defendant retains its due process right to undertake reasonable discovery necessary to ascertain whether there has been a material change in applicant's condition or circumstance. (*Hardesty v. McCord & Holdren* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].) Such discovery includes, but is not limited to, the deposition of applicant or other relevant witnesses, and/or obtaining supplemental reporting or deposition testimony from applicant's treating physicians. In the event of a change in applicant's circumstance or medical condition, defendant would rightfully need to consider whether to authorize the requested treatment following an internal review or to evaluate

the medical necessity of the treatment through the UR process. (*Sandhagen, supra,* 44 Cal.4th 230, 248.) However, pursuant to our holding in *Patterson*, *supra*, 79 Cal.Comp.Cases at p. 918, a change in circumstance is the *precipitating event that triggers the need to reevaluate medical necessity*. Defendant may not satisfy its burden of establishing such a material change in circumstance by offering a Utilization Review determination obtained after the fact. (*Id.* at p. 918.)

Defendant further contends we lack the jurisdiction to resolve the instant medical treatment dispute because the UR decision was valid and timely. (Petition, at p. 4:2.) In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that it has jurisdiction to determine whether a UR decision is timely. If the UR decision is timely, the Appeals Board has no jurisdiction to address disputes regarding the UR because "[a]ll other disputes regarding a UR decision must be resolved by IMR." (*Id.* at p. 1299.) As noted in the *Dubon II* decision, section 4604 provides that "[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5." (*Id.* at p. 1305.) Sections 4610 and 4610.5 expressly define a UR decision addressing treatment "based in whole or in part on medical necessity." In *Dubon II*, the Appeals Board found that sections 4610.5 and 4610.6 "specifically provide that where there is a dispute regarding a UR decision on 'medical necessity,' the dispute shall be resolved only by IMR." (*Id.* at p. 1309.) However, "where there is no timely UR decision subject to IMR, the issue of medical necessity must be determined by the WCAB." (*Id.* at p. 1312.)

Here, the lack of a material change in applicant's condition or circumstances obviates the need for a renewed evaluation of ongoing medical treatment. Utilization review is inapposite when medical treatment has been determined to be reasonable and necessary and when there has been no material change in the underlying condition or circumstances necessitating that medical treatment. (Lab. Code, § 4600(a).) In the absence of a change in circumstance, applicant's previously authorized treatment continues to be medically necessary. Because there is no reasonable basis to assert a dispute regarding the medical necessity of treatment that has already been determined to be reasonable and necessary, the Appeals Board retains its jurisdiction to determine the award of medical treatment. (Lab. Code, § 4604; *Dubon II*, *supra*, at p. 1305.)

In summary, we agree with the WCJ that defendant has not met its affirmative burden of establishing a material change in applicant's medical treatment or circumstance that would

otherwise require defendant to either authorize the requested treatment or submit the request through Utilization Review. Because there was no valid medical dispute arising out of a change in condition or circumstance, we concur with the WCJ's determination that defendant is obligated to continue to provide home health services unless and until defendant demonstrates a material change in applicant's condition or circumstance. We will affirm the F&O, accordingly.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

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

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

**January 13, 2025**

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

**FILIBERTO CUELLAR**
**LAW OFFICES OF CHRISTOPHER CONGLETON**
**DIETZ, GILMOR & CHAZEN**

**SAR/abs**

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