WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LYNNE SHAW, *Applicant*

vs.

AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA; HARTFORD INSURANCE, *Defendants*

Adjudication Number: ADJ8996318
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Automobile Club of Southern California seeks reconsideration of the July 3, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that the Workers' Compensation Appeals Board (WCAB) has jurisdiction to resolve the parties' dispute and that the treatments requested in applicant's exhibits 3 and 4 are reasonable, necessary, and are a compensable consequence of the industrial injury to the cervical spine and bilateral wrists.

Defendant contends that based on the parties' stipulations and the Qualified Medical Evaluator's (QME) reports of Aidan Clarke, M.D., the requested treatment is non-industrial and not medically necessary on an industrial basis. Defendant further contends that the Primary Treating Physician (PTP) reports of Edward Wieseltier, D.O., who requested the treatment, is not substantial evidence. Finally, defendant contends that the issue of whether the requested treatment is medically necessary should be submitted to utilization review pursuant to Labor Code,[1] section 4610(m) or, in the alternative, that defendant be allowed to obtain an update QME report under section 4062.

[1] All statutory references are to the Labor Code unless otherwise indicated.

We received applicant's answer. We also received applicant's own petition for reconsideration.[2] Applicant seeks penalties and attorney's fees in her petition for defendant's delay in authorizing the requested treatment. However, we note that although the May 30, 2023 Minutes of Hearing identifies penalties and attorney's fees as an issue for trial, the July 3, 2023 does not contain any findings on the issue of penalties and attorney's fees. Thus, applicant's petition for reconsideration is premature.

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 and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration of the July 3, 2023 Findings and Award to amend finding number 1 to indicate that defendant did not timely deferred utilization review upon receiving two medical reports with two requests for authorization.

FACTS

As the WCJ stated in his Report:

> The exhibits offered by the parties indicate that the treating physician, Dr. Edward Weiseltier issued a Request for Authorization (RFA) on June 16, 2022. (Applicant's Exhibit 1) Under the heading of diagnosis, the doctor has indicated "knee pain, bilateral", and "gait disorder." Defendant, upon receipt of this RFA issued a timely "Notice of Deferred RFA" dated June 21, 2022, addressed to Dr. Weiseltier and copied to applicant's attorney. (Applicant's Exhibit 8).
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> In this notice, defendants state that the only accepted orthopedic body parts are the cervical spine and bilateral wrists. This first notice of deferred RFA was in concert with the requirements of California code of regulations section 9792.9.1, as the physician's report did not provide any explanation as to why these new body parts are a compensable consequence of the original industrial injury. Defendant required additional information prior to processing the RFA through utilization review.

[2] Applicant's Petition for Reconsideration and Answer to Defendant's Petition for Reconsideration was erroneously filed in ADJ8939984, a matter that has been dismissed. (Defendant Exhibit H, Award and Stipulations with Request for Award.) Nevertheless, we considered it as part of this matter, ADJ8996318.

Thereafter, on September 29, 2022 Dr. Weiseltier issued a supplemental report addressing the issues raised by defendant concerning applicant's gait disorder and knee pain. The report states in relevant part:

> The patient has a severe spinal cord injury that had resulted in partial loss of her use of the tower extremity resulting in a severe gait disorder. As I had previously mentioned in my 06/16/2022 report:
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> She has been having progressively worsening right lower extremity complaints, most notably around the right knee. She states that this has been going on due to the severe gait disorder that she has. She describes herself as "dragging her right lower extremity during ambulation." On examination today, the patient demonstrates this exactly as she describes it. Despite having full motor strength of her knee extensors and dorsiflexors on the right side, she is unable to coordinate hip flexion, knee flexion and dorsiflexion during the swing phase of gait. This clearly puts a tremendous amount of effort and stress in the patient's right lower extremity to prevent full weight bearing while trying to attempt swing phase. She has developed a significant amount of medial joint space narrowing in the right knee as confirmed on the x-rays today.
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> The reason for her having this significant gait disorder is due to her spinal cord injury after her cervical spine surgery. At this time, it would be important for the patient to undergo an orthoptist evaluation for consideration of an AFO or other orthosis to help with the patient's swing phase during ambulation.
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> The patient is unable to go out to the community without any assistance from family members or friends as she is not safe by herself with a rollator alone. This extremely limits her to performing her activities of daily living in the community. Therefore, I am asking for the patient to be provided with a mobility scooter.

. . .

Unfortunately, there is no proof that the above supplemental report and accompanying RFA dated September 29, 2022 was transmitted by mail, email or fax to defendant for utilization review until applicant sent the report to defendants on October 28, 2022.

On October 28, 2022, applicant's attorney sent the September 28th report to the adjuster with a cover letter stating in part: PLEASE RETRACT

> YOUR DEFERRAL OF UR AS THE BODY PARTS INJURED PER THE STIPULATION AND AWARD ARE ALSO PART OF THE MEDICAL REPORTS AND RFAS SO THE TREATMENT SHOULD BE COVERED. Applicant is in need of further medical treatment and request is hereby made that same be furnished per Dr. Wieseltier's reports and recommendations. (Applicant's Exhibit 6)
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> Thereafter, on October 31, 2022 defendant again issued a notice of deferred RFA stating: "the only accepted orthopedic body parts are the cervical spine and bilateral wrists." (Report, pp. 2-4; internal quotations omitted.)

DISCUSSION

Section 4610(l) permits a defendant to defer utilization review when it disputes liability for injury or treatment. (§ 4610(l); Cal. Code Regs., tit. 8, Rule 9792.9.1(b).) Rule 9792.9(b)(1) requires that, among other things, that the deferral be served on the injured worker, in addition to the injured worker's attorney if the injured worker is represented by counsel. (Cal. Code Regs., tit. 8, Rule 9792.9.1(b)(1).) Here, there is no indication that either the June 21, 2022 or the October 31, 2022 Notices of Deferred RFA were served on applicant. (Defendant Exhibits F and G, Notices of Deferred RFA dated June 21, 2022 and October 31, 2022.) As such, the Notices of Deferred RFA are defective and deemed untimely. (*Dubon v. World Restoration (Dubon II)* (2014) 79 Cal.Comp.Cases 1298, 1306 [2014 Cal. Wrk. Comp. LEXIS 131] (Appeals Board En Banc); *Bodam v. San Bernardino County/Dept. of Soc. Servs.* (2014) 79 Cal.Comp.Cases 1519, 1522 [2014 Cal, Wrk. Comp. LEXIS 156].) Under these circumstances, the WCAB may decide on the issue of medical necessity of the requested treatment based on substantial evidence. (*Dubon II* at p. 1312; *Bodam* at p. 1522.) We agree with the WCJ that the treatment requested is reasonable, necessary, and a compensable consequence of the industrial injury.

> The WCJ has found that the treatment requested is reasonable, necessary, and a compensable consequence of the industrial injury, pursuant to the opinions of the primary treating physician. Defendant's petition makes numerous arguments as to why the treating physician's opinion is not substantial evidence. However, the plain language of the physician's opinion, as cited above, provides a clear and logical explanation as to why the requested treatment is a compensable consequence of the industrial injury. Applicant's treatment for her serious industrial injuries should not suffer any further delays. (Report, p. 8.)

We further agree with the WCJ that the 2016 stipulations and award entered between the parties does not prohibit the requested treatment. (Defendant Exhibit H, Award and Stipulations with Request for Award.) The WCJ states in his Report:

> CAN AN ADDENDUM TO A STIPULATION AND AWARD LIMIT FUTURE MEDICAL CARE TO EXCLUDE MEDICAL TREATMENT TO BODY PARTS THAT ARE A COMPENSABLE CONSEQUENCE OF THE ORIGINAL INJURY**?**
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> Numerous cases have established the rule that the WCAB has jurisdiction to award treatment for new conditions that are a compensable consequence of the initial industrial injury — even if the condition was not part of the original award, and even if the employee first requests treatment for the condition more than five years after date of injury: *Testa Enterprises v. WCAB (De La Garza) (2003) 68 CCC 1626 (writ denied); Pirelli Armstrong Tire Co. v. WCAB (Van Zant) (2003) 68 CCC 970 (writ denied); Gardner v. WCAB (1992) 57 CCC 670 (Court of Appeal decision unpublished in official reports); Bidwell v. WCAB (1993) 58 CCC 237 (Court of Appeal decision unpublished in official reports); Allar v. Fullerton School District, 2010 Cal. Wrk. Comp. P.D. LEXIS 455; Del Rosario v. City of Oakland, 2010 Cal. Wrk. Comp. P.D. LEXIS 574; City of Los Altos (Police Department) v. WCAB (Verna) (2012) 77 CCC 640 (writ denied); San Joaquin Community Hospital v. WCAB (Clark, Diefenbach) (2014) 79 CCC 984 (writ denied); Crossley v. Federal Express Corp., 2015 Cal. Wrk. Comp. P.D. LEXIS 342; Meadows v. Bridgestone, 2019 Cal. Wrk. Comp. P.D. LEXIS 498.*
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> Turning to the case at hand, applicant has alleged that she is in need of medical treatment to the lower extremities as a compensable consequence of the industrially injured neck and wrists. However, the parties entered into a stipulated Award on January 14, 2016 which states at paragraph (d) of the addendum: "This Stipulated Award specifically limits the defendant's liability for future medical care to only the body parts of psyche/adjustment disorder, cervical spine and bilateral carpal tunnel syndrome post release surgery."
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> The cases cited above establish the principle that medical care for an industrially injured body part will include treatment to other conditions and body parts that are later found to be a compensable consequence of the original injury. Therefore, defendant may not refuse treatment to body parts or conditions which are found to be a compensable consequence of the original injury to admitted body parts. Any language in a settlement which purports to do so is contrary to law, and should not be enforced by the WCAB. In this case, paragraph (d) of the addendum to the stipulations with request for award states: "Therefore this stipulated award specifically