WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUVENCIO TORRES-RAMOS, ***Applicant,*** **vs.** **FELIX MARQUEZ; REDWOOD FREE INSURANCE COMPANY, Administered By BERKSHIRE HATHAWAY,** ***Defendants.***	**Case No. ADJ982471 (LAO 0859620)** **OPINION AND ORDER DENYING DEFENDANT'S PETITION FOR REMOVAL AND DISMISSING APPLICANT'S PETITION FOR RECONSIDERATION**

Defendant seeks removal, and applicant seeks reconsideration, of the January 31, 2014 Findings and Order (Order), wherein the workers' compensation administrative law judge (WCJ) referred the issue of whether applicant is in need of pain management treatment to the Independent Medical Review (IMR) process. The WCJ also found that a report by Lawrence R. Miller, M.D. constituted substantial evidence and did not need to be incorporated into the primary treating physician's report. Although this finding was not in the Order, the WCJ also concluded that defendant's utilization review was timely.

In its Petition for Removal, Defendant contends that it will be significantly prejudiced, and will suffer irreparable harm, as a result of the Order.

In his Petition for Reconsideration, applicant contends that the WCJ erred in concluding that defendant's utilization review was timely.

We have reviewed applicant's Answer to defendant's Petition for Removal, as well as defendant's Answer to applicant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Removal by Defendant and Petition for Reconsideration by Applicant (Report), recommending that both Petitions be denied.

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Additionally, we have received and reviewed a letter from applicant's attorney, dated March 20, 2014, which is titled "Applicant's Verified Withdrawal of Petition for Reconsideration."

We have considered the Petition for Removal and the Petition for Reconsideration, the respective Answers, applicant's Withdrawal of Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter.

For the reasons expressed by the WCJ in his Report, which we adopt and incorporate by reference, and for the reasons discussed below, we will deny defendant's Petition for Removal. Additionally, for the reasons discussed below, we will dismiss applicant's Petition for Reconsideration.

FACTS

While employed by defendant as a driver/delivery person May 2, 2005, applicant sustained an admitted industrial injury to his forehead, lumbar spine, and psyche.

On July 10, 2013, applicant's primary treating physician, Jack O. Piasecki, M.D., issued a primary treating physician's progress report, using DWC Form PR-2, requesting authorization for a consultation with a pain management specialist for possible narcotics detoxification. (App. Exh. 16.)

On September 9, 2013, applicant was evaluated by Lawrence R. Miller, M.D., a pain management specialist. (September 9, 2013 Initial Pain Management Consultation/Request for Authorization/Review of Records, Joint Exh. W.) Dr. Miller recommended that applicant receive "three four-day treatments of peripheral percutaneous nerve stimulation to be done in conjunction with outpatient narcotic wean." (*Ibid.*)

On September 23, 2013, Dr. Miller issued a secondary treating physician's progress report, also using DWC Form PR-2, reiterating his request for authorization of "three four-day outpatient treatment[s] of percutaneous peripheral nerve stimulation to be conducted in conjunction with outpatient methadone wean and detox." (App. Exh. 16.) However, as the WCJ noted in his Report, Dr. Miller's PR-2 "[did] not include the required RFA (request for authorization) form that is required by the most recent version of 8 CCR Rule 9792.6(b) that took effect on 01 July 2013." (Report, pp. 2-3.)

In a letter dated September 29, 20013, defendant denied authorization for the treatment recommended by Dr. Miller. (Notice of Non-Authorization, App. Exh. 14 and Def. Exh. M.)

The parties appeared for trial on November 6, 2013 on the issue of (1) need for further medical treatment as requested by Dr. Miller; (2) whether defendant's Utilization Review was timely; (3) whether the authorization request was in the proper format; (4) whether the primary treating physician should incorporate Dr. Miller's authorization request; and (5) whether Dr. Miller's report constitutes substantial evidence. (November 6, 2013 Minutes of Hearing (Reporter) [MOH], p. 2:11-18.) All other issues were deferred, with jurisdiction reserved.

On January 31, 2014, the WCJ issued his Order, referring the issue of whether applicant is in need of pain management treatment to the IMR process and finding that Dr. Miller's Report constituted substantial evidence and did not need to be incorporated into the primary treating physician's report.

Defendant timely sought removal, contending that it will be significantly prejudiced, and will suffer irreparable harm, as a result of the Order. Defendant argues that Dr. Miller's Report does not constitute substantial evidence, and that Dr. Miller's Report should be incorporated into the reports of applicant's primary treating physician, Dr. Piasecki. Defendant also argues that the WCJ erred in referring this matter to the IMR process.

Applicant timely sought reconsideration of the same Order, contending that the WCJ erred in concluding, as set forth in the accompanying Opinion on Decision, that defendant's utilization review was timely.

DISCUSSION

With respect to applicant's Petition for Reconsideration, applicant has communicated that he wishes to withdraw his Petition. Specifically, applicant's attorney states that the WCJ's Report "makes it clear that the applicable regulation in the instant case is CCR 9792.6.1 and not CCR 9792.6." In turn, the WCJ's Report notes that Dr. Miller issued his PR-2 on September 23, 2013; that as of July 1, 2013, a PR-2 must also include an RFA as required by the version of Administrative Director Rule 9792.6.1(b) that took effect on July 1, 2013; and that Dr. Miller's report did not include the required RFA. As the WCJ noted, "Here, the regulations are very specific and Dr. Miller did not comply with those regulations. The fact that Defendant may have been tardy in its response to a form that violated those regulations does not support a finding against the Defendant. Therefore, utilization review is due when Dr. Miller sends

in the right form." (Report, pp. 4-5.) There being no objection from defendant, we see no reason not to respect applicant's wishes as set forth in the March 20, 2014 Withdrawal of Petition for Reconsideration. Accordingly, we will dismiss applicant's Petition for Reconsideration.

Turning to defendant's Petition for Removal, removal of a case to the WCAB "is an extraordinary remedy, rarely exercised[.]" (*Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal. Comp. Cases 1460, 1462 (writ den.).) The party seeking removal must show that the order it appeals "will result in significant prejudice [or] ... irreparable harm." (Cal. Code Regs., tit. 8, § 10843.) Under this standard, and based upon our review of the record and the WCJ's Report, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied. Accordingly, we will deny defendant's Petition for Removal.

As guidance to the parties, however, we note that under Administrative Director Rule 9792.6.1(b), requests for treatment authorization after July 1, 2013 must be accompanied by "a completed 'Request for Authorization for Medical Treatment,' DWC Form RFA [...] that has been transmitted by the treating physician to the claims administrator." (Cal. Code Regs., tit. 8, § 9792.6.1(b).) This form appears not to have been submitted in the instant matter, and we remind the parties of this requirement for their future reference. We note further that it is the employer's duty to provide the IMR organization with all relevant medical information; here, that would include the records of Dr. Piasecki. (Lab. Code, § 4610.5.)

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For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the January 31, 2014 Findings and Order is **DENIED**.

IT IS ORDERED that applicant's Petition for Reconsideration of the January 31, 2014 Findings and Order is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

FRANK M. BRASS

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 28 2014

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

JUVENCIO TORRES-RAMOS
GLAUBER BERENSON LLP
BOLEN & MASSINO, LLP

RB/sye

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
WORKERS' COMPENSATION APPEALS BOARD

CASE NO.: ADJ982471

JUVENCIO TORRES-RAMOS	*vs.*	FELIX MARQUEZ; REDWOOD FIRE & CASUALTY COMPANY c/o BERKSHIRE HATHAWAY HOMESTATE COMPANIES,
WORKERS' COMPENSATION JUDGE:		ROGER A. TOLMAN, JR.
DATE OF INJURY:		02 May 2005

REPORT AND RECOMMENDATION
ON PETITION FOR REMOVAL BY DEFENDANT
AND
PETITION FOR RECONSIDERATION BY APPLICANT

I.

INTRODUCTION

Defendant REDWOOD FIRE & CASUALTY COMPANY c/o BERKSHIRE HATHAWAY HOMESTATE COMPANIES, by and through his attorney of record, has filed a timely Petition for Removal challenging the Findings and Order of 31 January 2014. In it, Defendant challenges two of the antecedent findings contained in the decision and challenges the finding that the matter should be decided by Independent Medical Review (IMR.)

Applicant has filed a timely Answer in which Applicant's counsel notes that the Defendant did not file a timely Petition for Reconsideration but that Defendant's Petition was clearly one for removal.

Additionally, Applicant, JUVENCIO TORRES-RAMOS, has filed a timely Petition for Reconsideration in which he argues that the regulations, while mandating a required form Request for Authorization of medical treatment in one regulation, permit a narrative request instead in another regulation.

To date, no Answer to Applicant's Petition for Reconsideration has been received.

It is recommended that Defendant's Petition for Removal be denied and that Applicant's Petition for Reconsideration also be denied.

II.

FACTS

JUVENCIO TORRES–RAMOS, born , sustained an injury arising out of and in the course of his employment on 02 May 2005. The Applicant's case-in-chief was litigated to Findings and Award before the undersigned and thereafter treatment was provided.

On or about 11 June 2013, the primary treating physician, Dr. Piasecki requested consultation with a pain management specialist for possible detoxification. That service was provided. Dr. Miller was consulted and he issued a report on a PR – 2 form dated (importantly) on 23 September 2013. In it he requests authorization for "three [or] four day outpatient treatment of percutaneous peripheral nerve stimulation to be conducted in conjunction with outpatient methadone wean and detox." The report contains discussion of subjective and objective findings and is signed. The report does not include the

required RFA (request for authorization) form that is required by the most recent version of 8 CCR Rule 9792.6(b) that took effect on 01 July 2013.

The response to Dr. Miller's PR-2 was a denial of authorization from Defendant's utilization review department dated 20 September 2013. However, there is conflicting evidence as to when the denial of authorization was sent. Defense counsel had a complete version of the document (Defense Exhibit M) that defense counsel received on 26 September 2013. By contrast, Applicant's counsel claims only to have received an incomplete version of the document (Applicant's Exhibit 14) and its received stamp shows receipt on 02 October 2013. Another received stamp on the same document bears the date of 07 October 2013.

III.

DISCUSSION

On 01 July 2013, a new regulation governing utilization review took effect. The regulation changed many aspects of medical treatment but two points are relevant here: First, all utilization review disputes over "reasonableness and necessity" are now decided by the Independent Medical Review (IMR) process. Second, in order to invoke the time deadlines for utilization review, the doctor seeking authorization for treatment must use the mandatory RFA form. The 01 July 2013 effective date refers to all requests for authorization that occur after that date. Prior to that date, a request for authorization could be requested in a PR- 2 or even in a narrative report.

In this case, Dr. Miller, a consulting pain management physician requested authorization in a PR-2 report in a report dated 23 September 2013, after the effective date of the new regulation. Therefore, under Rule 9792.6.1(b) no request for authorization has occurred.

Counter to this, Applicant's counsel makes two arguments. First, he argues that Rule 9792.6(o) applies in this case, which permits the use of narrative and PR-2 reports. However, Rule 9792.6 without the "point one" designation at the end is the old version of the rule effective until the end of June 2013. See Rule 9792.6. Subsection (o) has been omitted in the new version of the rule in rule 9792.6.1. Therefore, Applicant's first argument is unpersuasive.

Applicant attorneys' second argument is a strong policy argument. He points out that the Defendant in fact responded to the request of Dr. Miller (albeit in tardy fashion), and cannot now complain that the request was on the wrong from. The argument implies that enforcement of the new regulation stresses form over substance.

Yet the single most difficult aspect of enforcing the utilization review regulations is the sheer volume of work. The Division adopted regulations that mandated forms as a means of regulating this work. Volume can best be addressed by enacting simple requirements for requests that adjusters can easily recognize.

The first question in due process analysis is to ask what process is due and that usually involves analyzing the existing regulations and statutes. Here, the regulations are very specific and Dr. Miller did not comply with those regulations. The fact that Defendant may have been tardy in its response to a form that violated those regulations

does not support a finding against the Defendant. Therefore, utilization review is due when Dr. Miller sends the right form. Therefore, it is recommended that Applicant's Petition for Reconsideration be denied.

With respect to Defendant's Petition for Removal and Applicant's Answer thereto, it is quite evident that it is a Petition for Removal and that Applicant attorney's point in his Answer is well taken: That to prevail on removal, irreparable harm must be shown. Here, Defendant criticizes the undersigned for finding Dr. Miller's report to be substantial evidence. However, in light of the results, it hardly matters whether it is or is not.

Defendant next points out that the request for authorization needs to be incorporated in the report of the primary treating physician. Like the Applicant's argument that a PR-2 or a narrative will suffice, Defendant's argument is steeped in the traditions of workers' compensation but is no longer the law. A request for authorization may come from any health care provider who is a treating physician. See Rule 9792.6.1(b) and (t.) There is no requirement any more of having a primary treating physician in utilization review.

Lastly, Defendant argues that the undersigned should not have deferred the issue to IMR. In fact, the point of the decision is the undersigned no longer has jurisdiction now that it has been established that the RFA form was not used. Pursuant to Labor Code section 4610, issues of reasonableness and necessity are no longer decided by judges, but by the utilization review and IMR process. The only exceptions occur where there is some legal issue that establishes that IMR does not apply.

Defendant has successfully established at trial that the report of Dr. Miller did not use the required RFA form. This does not necessarily mean that Defendant does not provide the medical care, at least at this point. It means that the parties must now complete the IMR process to determine reasonableness and necessity.

IV.

RECOMMENDATION

It is recommended that the Defendant's Petition for Removal be denied. It is also recommended that Applicant's Petition for Reconsideration also be denied.

Respectfully submitted,

Date: March 5, 2014

ROGER A. TOLMAN, JR.
Workers' Compensation Judge

Served by mail 3/6/2014
on parties as shown on
Official Address Record.

By: _____
Linda Simien