

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

KOREY RIVOTA, *Applicant*

vs.

NATIONAL CEMENT COMPANY, INC.;
ARCH INSURANCE COMPANY, administered by GALLAGHER BASSETT
SERVICES, INC., *Defendants*

Adjudication Number: ADJ9856812
Van Nuys District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We acknowledge applicant's case status inquiry letter filed on January 21, 2021 but note that the 60-day statutory period for us to act does not expire until February 1, 2021.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 1, 2021

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

**KOREY RIVOTA
ODJAGHIAN LAW GROUP
KEGEL, TOBIN & TRUCE**

PAG/pc

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

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

WCAB Case No(s). ADJ 9856812

KOREY RIVOTA, VS. NATIONAL CEMENT COMPANY, INC.;
ARCH INSURANCE COMPANY,
administered by Gallagher Bassett
Services, Inc.,
APPLICANT, DEFENDANT(S).

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK DECEMBER 7, 2020

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION**

INTRODUCTION:

On December 3, 2020, the Defendant filed a timely and verified petition for reconsideration dated December 3, 2020, alleging that the undersigned WCJ erred in his Findings of Fact & Award dated November 13, 2020. The Defendant contends that the undersigned WCJ erred in relying on Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision) in finding that the Applicant was entitled to further medical treatment in the form of continued interdisciplinary post-acute residential rehabilitation at the Casa Colina's Transitional Living Center absent any change in circumstances. In addition, the Defendant contends that the Applicant's continued stay at the center is not supportable as reasonable and necessary medical treatment.

STATEMENT OF FACTS:

The Applicant, while employed on May 5, 2014, as a cement truck driver, by National Cement Company, Inc., sustained injury arising out of and in the course of employment to his head, brain, nose, eyes, ears, mouth, cervical spine, lumbar spine, both shoulders, both lower extremities, ribs, lungs, internal system (in the form of sleep disorder), psychiatric system, urological system (in the form of sexual dysfunction), endocrine system (in the form of diabetes), and cardiovascular system (in the form of hypertension).

On November 15, 2018, WCJ Rasmusson issued his Award for 100% permanent disability with the need for further medical treatment.

Since January 23, 2020, the Defendant has been providing ongoing authorization for the Applicant's inpatient residential care at Casa Colina's Transitional Living Center pursuant to the recommendations of David R. Patterson, M.D., the Applicant's primary treating physician.

However, when Dr. Patterson submitted a request for the Applicant to continue to stay at the Casa Colina's Transitional Living Center dated September 25, 2020, it was denied by the Defendant's utilization review on October 1, 2020.

On October 14, 2020, the Applicant filed his declaration of readiness to proceed dated October 14, 2020, alleging that the Defendant's utilization review denial dated October 1, 2020 was untimely.

On November 6, 2020, the parties appeared before the undersigned WCJ for an expedited hearing regarding the Applicant's need for further medical treatment in the form of continued interdisciplinary post-acute residential rehabilitation at the Casa Colina's Transitional Living Center.

On November 13, 2020, the undersigned WCJ issued his Findings of Fact & Award dated November 13, 2020, awarding the Applicant further medical treatment in the form of continued interdisciplinary post-acute residential rehabilitation at the Casa Colina's Transitional Living Center absent any change in circumstances in accordance with Patterson.

Aggrieved by this decision, the Defendant filed its petition for reconsideration.

DISCUSSION:

Labor Code § 4600 requires a defendant to provide medical treatment "reasonably required to cure or relieve the injured worker from the effects of his or her injury" if there is a medical recommendation or prescription that there is a "demonstrated medical need" for such services. [Smyers v. Workers' Comp. Appeals Bd. (1984) 49 Cal. Comp. Cases 454, 458.]

In addition, in Patterson, the defendant unilaterally ceased to provide previously agreed reasonable medical treatment notwithstanding that there was no evidence of a change in the applicant's condition or circumstances that supported cessation of the treatment. In finding that the defendant's unilateral cessation of nurse case manager services in Patterson was contrary to the Labor Code § 4600(a) duty to provide reasonable medical treatment, the WCAB recognized that the defendant's agreed obligation to provide that treatment in that case was not eliminated by the adoption of the utilization review and independent medical review statutes subsequent to the parties' agreement, writing as follows:

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*, 79 Cal. Comp. Cases at p. 918.]

In Kumar v. Sears Holding Corp. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 502 (Appeals Board noteworthy panel decision), the WCAB found no good cause to reduce or eliminate the applicant's home health care services because the defendant had not made a showing that the applicant's condition or circumstances had changed.

Terminating medical treatment that was earlier authorized as reasonably required to cure or relieve the injured worker from the effects of the industrial injury is contrary to Labor Code § 4600(a) unless supported by substantial medical evidence. [Patterson, *supra*, 79 Cal. Comp. Cases at p. 918.]

Notwithstanding the Defendant's contention that Patterson should not apply to the present case, the WCAB has not limited its application only to "nurse case managers" and "home health care" services but to various other medical treatment modalities, including continued placement in care facilities such as Casa Colina's Transitional Living Center. [See Rabenau v. San Diego Imperial Counties Development Services Incorporated (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 97 (Appeals Board noteworthy panel decision) (Patterson found applicable with respect to non-medical transportation services); see also Duncan v. County of Ventura (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 131 (Appeals Board noteworthy panel decision) (Patterson found applicable to medical treatment in the form of board and care facility/assisted living); see also Tinsley v. Vertis Communications (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 575 (Appeals board noteworthy panel decision) (Comm'r Sweeney, concurring) ("the facts presented by this case [regarding continued care at Casa Colina's Transitional Living Center] are similar to those addressed by the Appeals Board in the *Patterson* significant panel decision."); see also Ramirez v. Kuehne and Nagel, Inc. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 537 (Appeals Board noteworthy panel decision) (Patterson found applicable with respect to non-medical transportation services); see also White v. Department of Social Services (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 454 (Appeals Board noteworthy panel decision) (Patterson found applicable with respect to payment of assisted living expenses to avoid an applicant's eviction); see also Gunn v. San Diego v. San Diego Dept of Social Services (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 414, *12 (Appeals Board noteworthy panel decision) (Patterson found applicable with respect to medical transportation services).]

In this case, based on the credible testimony of Karla Markarian, the Applicant's nurse case manager, Dr. Patterson has been required to provide ongoing requests for authorization in order to receive payment for the Applicant's continued stay at the center and has been unduly pressured by the Defendant to transition the Applicant out of the center into a private residence. In addition, Ms. Markarian testified that the Applicant has a continuing need for placement at the center per Dr. Patterson and that, if forced to discharge the Applicant, would require that, per the recommendation of Dr. Patterson, 24 hour care be provided to the Applicant to prevent disruption of his care. Finally, Ms. Makarian noted that there was no evidence of any change of circumstances and no reasonable basis to discharge the Applicant at this time.

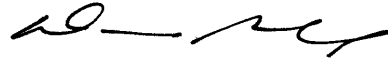
Ultimately, ensuring the Applicant's continued stay at Casa Colina's Transitional Living Center, absent any change in circumstances in accordance with Patterson and without the Defendant's constant demands for ongoing requests for authorization, will ensure the Applicant's safety and maintain continuity in his living situation and medical care. [See White v. Taco Bell Corporation (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 395 (Appeals Board noteworthy panel decision) (the defendant's failure to diligently act upon a treating physician's request for indefinite assisted living caused the applicant to be removed from the assisted living facility and be dropped off on skid row in downtown Los Angeles).]

Therefore, for the reasons set forth above, there is no basis to disturb the undersigned WCJ's decision that the Applicant remain at Casa Colina's Transitional Living Center absent any change of circumstances.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Defendant's petition for reconsideration dated December 3, 2020 be denied.

Date: December 7, 2020



DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE