**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

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| **CELIA PEREZ DE PRECIADO,**<br>***Applicant,***<br>**vs.**<br>**ROSS STORES, INC.; SEDGWICK CLAIMS MANAGEMENT SERVICES,**<br>***Defendants.*** | **Case No. ADJ8100720**<br>**(Van Nuys District Office)**<br><br>**OPINION AND DECISION AFTER RECONSIDERATION** |

We previously granted reconsideration with regard to the decision filed on April 14, 2016, to provide us with sufficient opportunity to further study the facts and legal issues involved, and to enable us to issue a just and reasoned decision. This is our decision after reconsideration.

Applicant sought reconsideration of the Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on April 14, 2016. That decision found that the November 18, 2015 Independent Medical Review (IMR) Determination, affirming the Utilization Review (UR) denial of a request for home health care, was not the result of a plainly erroneous express or implied findings of fact, and that the Administrative Director (AD) did not exceed his authority by adopting the IMR determination.

Applicant disputes the F&O and contends that the home care assistance requested by her treating physician does not fall within the parameters of the Medical Treatment Utilization Standards (MTUS) and, therefore, the MTUS cannot properly evaluate her need for home care assistance. Specifically, she argues that home care services, such as the assistance she requires with household chores, self-care, and personal hygiene, are distinguishable from home health care services as those services are defined by the MTUS. Applicant asserts that the home care services prescribed by her treating physician should be authorized pursuant to Labor Code[1] section 4600(h), and *Bishop v. Workers' Comp. Appeals Bd.* (2011)

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

76 Cal. Comp. Cases 1192 (writ den.). She further asserts that the particular ancillary housekeeping and home assistance services prescribed by her physician do not require justification by evidenced-based medical treatment guidelines or scientifically-based, peer-reviewed journals because they are based on plain common sense and intended to provide relief from the residual effects of the industrial injury.

The WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report), recommending the Petition be denied. Defendant filed an answer to the petition. We have carefully reviewed the record in this matter and have given due consideration to the evidence presented, the arguments set forth in the petition, and the WCJ's Report. For the reasons set forth in the following discussion, we find that the record with respect to home health care requires further development. Therefore, we amend the April 14, 2016 F&O to rescind the findings that the AD did not exceed his authority by adopting the IMR determination and that the determination of the AD was not the result of a plainly erroneous express or implied findings of fact. We otherwise affirm the WCJ's decision and return the matter for further proceedings as necessary and a new IMR.

## RELEVANT FACTS

Applicant, while employed as a floor associate by defendant on July 27, 2011, sustained an industrial injury to her back. Applicant received medical treatment, including two epidurals and lumbar spine surgery.

Her primary treating physician is Kyle H. Landauer, M.D. He began treating applicant on July 10, 2013. On December 20, 2013, applicant underwent lumbar spine surgery. Between January and November 2014, Dr. Landauer issued reports recommending home health care four hours a day, seven days a week. Some reports did not discuss home health care. (Applicant's Ex. 4, 7/15/15 deposition.) In Dr. Landauer's October 31, 2014 report, he noted her difficulties with activities of daily living (ADLs) and requested home health care four hours a day, for four to six weeks. He also requested that a nurse case manager perform a full assessment of applicant's need for homecare. (Applicant's Ex. 1.)

The nurse case manager, Sally Glade, R.N., evaluated applicant's need for homecare, and issued a report on December 23, 2014. She noted that although applicant could previously perform ADL's such as

bathing, using the restroom, preparing meals, housecleaning, doing laundry, and driving, at the time of the assessment, she could no longer do those ADLs and required home health care. Ms. Glade found that applicant required home health care four hours a day, seven days a week, on a continuing basis. (Applicant's Ex. 2.)

In Dr. Landauer's April 3, 2015 report, he stated that applicant needed increased home health care services after surgery, starting with 20 hours of care, seven days a week for one week. Thereafter, the services could be decreased gradually over time to four hours per day, seven days a week. He found that care beyond ten weeks post-operatively was not necessary. (Applicant's Ex. 3.)

In his July 15, 2015 deposition, Dr. Landauer addressed the ambiguities and omissions in his reports regarding applicant's need for home health care services. He did not discuss her need for home health care with her on every office visit, so some reports did not mention it. Dr. Landauer explained that, in his April 3, 2015 report, he misstated that applicant did not need home health care services. He had not been aware that her husband could no longer help her with ADLs due to his own health problems. Dr. Landauer clarified that applicant needed home health assistance with ADLs, not nursing services. He confirmed that due to her medications, gastrointestinal and orthopedic injuries, lower extremity atrophy, and use of a cane, it would be very difficult for her to compete in the open labor market. (Applicant's Ex. 4.)

In Dr. Landauer's July 24, 2015 report, he requested transportation services to her medical appointments as well as home health care services, four hours a day, five days a week. In his September 4, 2015 report, he noted that after surgery, applicant continued to have severe low back pain and right lower extremity atrophy, and that she used a cane. He again requested transportation and home health care services, four hours a day, five days a week. (Applicant's Ex. 6.)

Defendant conducted UR. On September 4, 2015, defendant issued a UR Determination denying the requested home health care assistance. (Defendant's Ex. A.) The UR notice states that "home assistance 4 hours a day is not medically necessary," and that home health care is for medical care and treatment and is "not to be used for housework." (*Id.*, p. 8.) The UR Determination relied on the 2009

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MTUS and concluded that, "This claimant has no complications from her surgeries that require home health care; she does not meet guidelines for this service." (*Id.*, p. 9.)

Applicant then filed an application for Independent Medical Review (IMR) of the UR notice. On November 18, 2015, the IMR Determination issued. With respect to the request for home care services, the IMR Determination states:

> The Expert Reviewer based his/her decision on the MTUS Chronic Pain Medical Treatment 2009 Guidelines, Home Health Services.
>
> The Expert Reviewer's decision rationale:
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> Home Assistance 4 hours a day 5 days a week is not medically necessary. Per CA MTUS page 51 Home health services are "Recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time or "intermittent" basis, generally up to no more than 35 hours per week. Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed. (CMS, 2004). [*sic*] The patient does not have a medical condition that denotes the patient is homebound on part-time or full time basis; therefore, the requested service is not medically necessary.
> (IMR Determination, November 18, 2015, p. 3.)

At applicant's request, an expedited hearing was held in this matter on April 11, 2016, regarding her claims of entitlement to medical treatment in the form of homecare assistance. At trial, the parties entered into stipulations and set forth the sole issue for adjudication—applicant's IMR appeal dated December 18, 2015. (Minutes of Hearing/Summary of Evidence (MOH/SOE), 4/11/16, p. 2.) No testimony was presented, and the matter was submitted on the record.

On April 14, 2016, the WCJ issued the F&O, finding in relevant part that the administrative director did not act without or in excess of its powers and that the determination of the administrative director was not the result of plainly erroneous express or implied findings of fact. The WCJ denied applicant's IMR appeal upholding the denial of home health care services. The April 14, 2016 decision is the basis of this opinion and decision after reconsideration.

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## DISCUSSION

An industrially injured worker is entitled, at his/her employer's expense, to medical treatment that is reasonably required to cure or relieve the effects of the industrial injury. (§ 4600(a).) Home health care services, including housekeeping services, have long been held to be subject to reimbursement under section 4600 as medical treatment reasonably required to cure or relieve from the effects of the injury, if there is a medical recommendation or prescription that certain housekeeping services be performed, i.e., that there is a "demonstrated medical need" for such services. (*Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 42.) "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." (*Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910, 916-917; see also, *Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44, 54 [65 Cal. Rptr. 3d 687]; and *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452 [103 Cal. Rptr. 785].)

In 2004, the legislature adopted section 5307.27, which directs the creation of the MTUS to evaluate treatment recommendations by physicians. (Stats 2003, ch 639, § 41 [SB 228], effective 1/1/2004.) The MTUS "shall incorporate evidence-based, peer-reviewed, nationally recognized standards of care . . . that shall address, at a minimum, the frequency, duration, intensity and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases." (*Id.*) At the same time, the legislature adopted section 4610, requiring employers to establish a UR process to ensure that "decisions based on the medical necessity to cure and relieve of proposed treatment services are consistent with" the MTUS. (§ 4610, Stats 2003, ch 639, § 28 [SB 228].). Thus, determinations as to whether medical treatment requests are reasonable and necessary will be based upon specified standards (see § 4610.5, subd. (c)(2)), as reflected in the treatment guidelines in the utilization schedule.

The MTUS is based upon the application of evidence-based medicine to ensure that clinical decision making is guided by the integration of the best available research evidence with clinical expertise and patient values. (Cal. Code Regs, tit. 8, § 9792.20, subd. (d), and § 9792.21, subd. (b).)

Section 4600 was later amended to add subdivision (b): "As used in this division and notwithstanding any other law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guideline adopted by the administration director pursuant to section 5307.27 (i.e., MTUS). (Stats. 2004, ch. 34, § 2 [SB 899], effective 4/19/2004.) Additionally, the MTUS "shall be presumptively correct on the issue of extent and scope of medical treatment . . . and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines is reasonably required to cure or relieve the injured worker from the effects of his or her injury." (Lab. Code, § 4604.5, Stats. 2004, ch. 34, § 47 [SB 889].)

At issue here is the 2009 Guideline, which was applied by the IMR reviewer to determine the medical necessity of the RFA for a home health care services. The former guideline provides:

> **Home health services**
>
> Recommended only for otherwise recommended medical treatment for patients who are homebound on a part-time or "intermittent" basis, generally up to no more than 35 hours per week. Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed. (CMS, 2004). (Chronic Pain Medical Treatment Guidelines, MTUS (Effective July 18, 2009), p. 51.)

In another case, the same guideline was applied by UR to deny a physician's request for authorization of a home health aide. The denial was upheld by IMR, and the WCJ denied the injured worker's appeal of the IMR determination, concluding she lacked authority to overturn it. Reconsideration was sought, and the Appeals Board panel affirmed the WCJ's determination.[2] Applicant's petition for writ of review was granted, and the Court of Appeal held that the Appeals Board panel misunderstood its statutory authority when it concluded that it was unable to review that portion of the IMR determination that found medical treatment does not include personal care given by home health aides. The decision acknowledges the Appeals Board's authority to review an IMR determination to

[2] *Frances Stevens v. Outspoken Enterprises, Inc.*, ADJ1526353, Opinion and Order Denying Applicant's Petition for Reconsideration, August 11, 2014. (2014 Cal. Wrk. Comp. P.D. LEXIS 392.)

determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. It states, "[t]hese grounds are considerable and include reviews of both factual and legal questions." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal. App. 4th 1074, 1100.) It remanded the case to the Appeals Board to consider whether the request for housekeeping and personal care services was denied without authority[3]. (*Id.*)

On May 19, 2017, the *Stevens* panel issued its decision after remittitur, finding that the AD exceeded his authority by adopting the IMR determination because the 2009 MTUS Chronic Pain Guideline for Home Health Services that was applied to deny the treatment request is an invalid regulation. The *Stevens* panel further clarified[4] that the guideline is not a medical necessity treatment standard, but a Medicare coverage (payment) standard, which is outside of the AD's authority under section 5307.27, and contrary to section 4600(h)[5] and long-standing case authority[6], making it void ab-initio. Specifically, the decision notes that section 5307.27 directs the AD to adopt regulatory guidelines to determine the reasonableness and necessity of medical treatment commonly provided in workers' compensation cases, and that address the frequency, duration, intensity and appropriateness of the treatment in accordance with evidence-based standards of care. The decision explains that because home health care is a modality of treatment commonly provided in workers' compensation cases, the 2009 MTUS Chronic Pain Guideline for Home Health Services should have defined the scope and extent of such services, in accordance with evidence-based treatment guidelines. (*Frances Stevens v. Outspoken Enterprises, Inc.* (*Stevens*) (June 30, 2017, ADJ1526353) [2017 Cal. Wrk. Comp. P.D. LEXIS 299][7].)

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[3] The California Supreme Court denied the request for review on February 17, 2016. (*Stevens v. Workers' Comp. Appeals Bd.*, 2016 Cal. LEXIS 1005.) The US Supreme Court denied the petition for certiorari on October 31, 2016. (2016 U.S. LEXIS 6556.)

[4] Opinion and Order Dismissing Petition for Reconsideration, June 30, 2017. (2017 Cal. Wrk. Comp. P.D. LEXIS 299.)

[5] Section 4600 was amended effective January 1, 2013, to add subdivision (h), which provides, in relevant part: "Home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 ... of Division 2 of the Business and Professions Code ..." (Stats 2012, ch 363, § 35 (SB 863).)

[6] *Smyers, supra*, (1984) 157 Cal. App. 3d 36 [49 Cal.Comp.Cases 454].

[7] Petition denied after writ of review issued. (*Outspoken Enterprises et al. v. Workers' Comp. Appeals Bd.*, Court of Appeal, First Appellate District, Div. 1, case number A152027, December 20, 2017.)

Moreover, the decision states that rather than summarily denying the treatment request because it is not addressed in the MTUS, the IMR reviewer should have applied the hierarchical framework in section 4610.5(c)(2)[8] and rules 9792.21 and 9792.21.1 to determine the medical necessity of the request. (*Id.*)

We endorse the *Stevens* panel's proclamation that the 2009 MTUS Chronic Pain Guideline for Home Health Services is an invalid regulation, and incorporate the analysis as set forth in its May 19, 2017 and June 30, 2017 decisions. We also observe that on July 28, 2016, the AD revised the "Chronic Pain" portion of the MTUS, including the regulation pertaining to home health care services[9].

In this matter, the November 18, 2015 IMR Determination upheld the September 4, 2015 UR denial of home health care, and was based on the 2009 Guideline:

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[8] Former Labor Code section 4610.5(c)(2), in effect at the time of the WCJ's June 5, 2015 decision, stated that the hierarchy should be applied "in the order listed, allowing reliance on a lower ranked standard only if every higher ranked standard is inapplicable to the employee's medical condition." (former Lab. Code, § 4610.5.)

[9] The revised guideline reads as follows: Recommended on a short-term basis following major surgical procedures or in-patient hospitalization, to prevent hospitalization, or to provide longer term nursing care and supportive services for those whose condition is such that they would otherwise require inpatient care. Home health care is the provision of medical and other health care services to the injured or ill person in their place of residence. Home health services include both medical and non-medical services deemed to be medically necessary for patients who are confined to the home (homebound) and who require one or all of the following: 1). Skilled care by a licensed medical professional for tasks including, but not limited to, administration of intravenous drugs, dressing changes, occupational therapy, physical therapy, speech-language pathology services, and/or 2) Personal care services for health-related tasks and assistance with activities of daily living that do not require skills of a medical professional, such as bowel and bladder care, feeding, bathing, dressing and transfer and assistance with administration of oral medications, and/or (3) Domestic care services such as shopping, cleaning, and laundry that the individual is no longer capable of performing due to the illness or injury that may also be medically necessary in addition to skilled and/or personal care services. Domestic and personal care services do not require specialized training and do not need to be performed by a medical professional (ACMQ, 2005) (Ellenbecker, 2008). A prescription or request for authorization for home health services must include justification for medical necessity of the services. Justification for medical necessity requires the physician's documentation of: (1) The medical condition that necessitates home health services, including objective deficits in function Chronic Pain Medical Treatment Guidelines MTUS – 8 C.C.R. § 9792.24.2 (July 28, 2016) 90 and the specific activities precluded by such deficits; (2) The expected kinds of services that will be required, with an estimate of the duration and frequency of such services; and (3) The level of expertise and/or professional licensure required to provide the services. Homebound is defined as "confined to the home". To be homebound means: • The individual has trouble leaving the home without help (e.g., using a cane, wheelchair, walker, or crutches; special transportation; or help from another person) because of the occupational illness or injury OR Leaving the home isn't recommended because of the occupational illness or injury AND • The individual is normally unable to leave home and leaving home is a major effort (CMS, 2014). Evaluation of the medical necessity of home health care services is made on a case-by-case basis. For home health care extending beyond a period of 60 days, the physician's treatment plan should include referral for an in-home evaluation by a Home Health Care Agency Registered Nurse, Physical Therapist, Occupational Therapist, or other qualified professional certified by the Centers for Medicare and Medicaid in the assessment of activities of daily living to assess the appropriate scope, extent, and level of care for home health care services (CMS, 2015). The treating physician should periodically conduct re-assessments of the medical necessity of home health care services at intervals matched to the individual patient condition and needs, for example, 30, 60, 90, or 120 days. Such reassessments may include repeat evaluations in the home.

> The Expert Reviewer based his/her decision on the MTUS Chronic Pain Medical Treatment Guidelines, Home Health Services 8 C.C.R. §9792.20 – 9792.26 MTUS (Effective July 18, 2009), page 51. (Defendant's Ex. B.)

The revised regulation of July 28, 2016[10] was not in effect when UR and IMR were conducted in this case, and we cannot apply it here to determine whether the AD exceeded his authority by adopting the IMR determination or whether the determination of the AD was the result of a plainly erroneous express or implied findings of fact.

The WCJ applied the 2009 MTUS that was in effect at the time of the April 14, 2016 decision. However, the MTUS that was relied on is an invalid regulation and is void ab initio. (*Stevens, supra,* 2017 Cal. Wrk. Comp. P.D. LEXIS 299.) Because the IMR looked only at the invalid guideline and stopped there, it did not evaluate applicant's request for home health care in accordance with the other appropriate standards set forth in section 4610.5(c)(2). The 2009 Guideline is silent as to the appropriate intensity, frequency, and duration of home health care services, and it was incumbent upon the IMR reviewer to evaluate the request by applying the treatment standards set forth in section 4610.5(c)(2) and AD rules 9792.21 and 9792.21.1 to determine the medical necessity of the request. (Cal.Code Regs., tit. 8, §§ 9792.21, 9792.21.1.)

Here, at the time of the April 14, 2016 decision, the WCJ found that the IMR Determination was not the result of a plainly erroneous express or implied findings of fact, and that the Administrative Director (AD) did not exceed his authority by adopting the IMR determination, and on that basis, denied applicant's appeal. Because we reach a contrary conclusion in light of *Stevens*, we rescind the WCJ's April 14, 2016 Finding 2 and Finding 3. The WCJ correctly noted in his Report, "if the MTUS is to be rebutted, other medical treatment guidelines or peer-reviewed studies must be used to justify the requested treatment. [Cal. Code Regs., tit. 8, § 9792.21(d)(1)]." We affirm the finding of industrial injury, and return this matter to the trial level for further proceedings in accordance with our decision. Upon return, the WCJ may determine what evidence, if any, should be provided to the new IMR reviewer when submitted for review pursuant to section 4610.6(i).

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[10] The 2017 revisions to the MTUS are not relevant to the issues presented here.

The 2016 MTUS, while not applicable to the timeline presented here, provides guidance and a framework for physicians to make clear the "what and why" of a prescription for home health care services, the specificity required, and the types of services permitted. If a requested treatment is not addressed in the MTUS, it may not be summarily denied; the IMR reviewer should apply the hierarchical framework in section 4610.5(c)(2) and AD rules 9792.21 and 9792.21.1 to determine the medical necessity of the request. (*Stevens, supra,* 2017 Cal. Wrk. Comp. P.D. LEXIS 299.) Section 4610.5(c)(2) directs that the MTUS should first be applied. If a physician concludes that there is a medical necessity for treatment such as home health care services that deviates from the MTUS, he or she must provide a rationale for the recommended treatment and make clear the connection between an injured worker's disability and his or her needs. It is the injured worker's burden to establish by a preponderance of the evidence that the proposed treatment is "reasonably required to cure or relieve the injured worker from the effects of his or her injury." (§§ 4600, 4604.5(a); see, *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Margaris)* (2016) 248 Cal.App.4th 349 [81 Cal.Comp.Cases 561, 567].)

In this case, the IMR determination was adopted without and in excess of the AD's authority and is subject to re-review by IMR. (Lab. Code, § 4610.6(i).) In his Report, the WCJ explained that the Chronic Pain MTUS and sections 4604.5(a) and 4610.6(i) were controlling. The WCJ applied the provisions of the 2009 MTUS and found that, because applicant requested "home health assistance with ADLs, not nursing services" the requested medical treatment is not authorized "when this is the only care needed" under the 2009 MTUS Chronic Pain Guideline for Home Health Services. The basis for that determination was application of the invalid 2009 MTUS. (*Stevens, supra,* 2017 Cal. Wrk. Comp. P.D. LEXIS 299.) Therefore, we cannot affirm the WCJ's findings with respect to home health care services.

We note that the instant case addresses only the validity of the WCJ's April 14, 2016 decision of applicant's IMR appeal dated December 18, 2015. Our grant of reconsideration on June 15, 2016 has stayed further litigation at the trial level, pending our resolution of the current proceeding. (§ 5910.) The record in EAMS reflects that applicant again requested home health care services (on November 27, 2017 and April 12, 2018), more than twelve months after the IMR appeal at issue here. While we make no determination of these RFAs, the UR processes, or the IMR determinations, we acknowledge that the

parties have been unable to litigate the issue of defendant's liability for home health care services. Thus, these matters have not yet been settled, determined, or adjudicated; they remain open and pending, and may be under the continuing jurisdiction of the Board.

Accordingly, we will amend the April 14, 2016 F&O to reflect that the issue of home health care is deferred, and otherwise affirm the decision.

For the foregoing reasons,

**IT IS ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the April 14, 2016 Findings of Fact and Order be, and hereby is, **AMENDED** to read as follows:

## FINDINGS OF FACT

1. The applicant, Celia Perez de Preciado, born [illegible], while employed on July 27, 2011, as a floor associate, at Cerritos, California, by Ross Stores, Inc., sustained injury arising out of and in the course of the employment to her back.

## ORDER

a. The applicant's Independent Medical Review Appeal dated December 18, 2015 is **DEFERRED**.

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**IT IS FURTHER ORDERED**, that the matter is **RETURNED** to the trial level workers' compensation administrative law judge for further proceedings as necessary to allow development of the record, and a new decision consistent with the opinion herein.

**WORKERS' COMPENSATION APPEALS BOARD**

JOSÉ H. RAZO

**I CONCUR,**

CHAIR

KATHERINE ZALEWSKI

DEIDRA E. LOWE

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

DEC 0 3 2018

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

**CELIA PEREZ DE PRECIADO**
**GLAUBER BERENSON**
**GRIFFIN LOTZ HOLZMAN**

**MG/abs**

**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

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|---|---|
| **CELIA PEREZ DE PRECIADO,**<br>***Applicant,***<br>**vs.**<br>**ROSS STORES, INC.; SEDGWICK CLAIMS MANAGEMENT SERVICES,**<br>***Defendants.*** | **Case No. ADJ8100720**<br>**(Van Nuys District Office)**<br><br>**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION** |

Reconsideration has been sought by applicant with regard to the decision filed on April 14, 2016.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

**IT IS ORDERED** that Reconsideration is **GRANTED.**

**IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication

Management System (EAMS). Any documents relating to the petitions for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioner for reconsideration should promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

**WORKERS' COMPENSATION APPEALS BOARD**

JOSÉ H. RAZO

**I CONCUR,**

DEIDRA E. LOWE

KATHERINE ZALEWSKI

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

JUN 15 2016

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

**CELIA PEREZ DE PRECIADO**
**GLAUBER BERENSON**
**GRIFFIN LOTZ & HOLZMAN**

**AS/bea**

[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

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

**WCAB Case No(s). ADJ 8100720**

**CELIA PEREZ DE PRECIADO,** VS. **ROSS STORES, INC.; ARCH INSURANCE COMPANY, administered by Sedgwick Claims Management Services, Inc.,**

APPLICANT, DEFENDANT(S).

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK MAY 10, 2016

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

**INTRODUCTION:**

On May 6, 2016, the Applicant filed a timely and verified Petition for Reconsideration dated May 6, 2016, alleging that the undersigned WCJ erred in his Findings of Fact & Order dated April 14, 2016. The Applicant contends that homecare services do not fall within the Medical Treatment Utilization Schedule, should be exempted from application of evidence-based treatment guidelines, and should have been deemed medically reasonable pursuant to the opinions of Kyle Landauer, M.D., the primary treating physician, and Sally Glade, R.N., the Applicant's nurse case manager.

**STATEMENT OF FACTS:**

The Applicant, while employed on July 27, 2011 as a floor associate by Ross Stores, Inc., sustained an industrial injury to her back while lifting an object.

On September 4, 2015, the Defendant issued a utilization review denial to a request for authorization received on August 28, 2015 by Kyle Landauer, M.D., requesting home assistance four hours a day and five days per week. [Defendant's Exhibit "A"] On November 18, 2015, the Administrative Director, through Maximus Federal Services, issued its final determination letter upholding the denial of the requested medical treatment by Dr. Landauer. [Defendant's Exhibit "B"]

On December 21, 2015, the Applicant filed her appeal to the determination of the administrative director dated December 18, 2015, alleging that the administrative director acted without or in excess of its powers and issued a determination that was not the result of plainly erroneous or implied findings of fact.

On March 2, 2016, the Applicant filed a Declaration of Readiness to Proceed to Expedited Hearing (Trial) to adjudicate the independent medical review appeal dated December 18, 2015. The case was scheduled for an expedited hearing on April 11, 2016 at 1:00 p.m. with the undersigned WCJ. Unable to resolve the dispute, the issue was submitted for decision before the undersigned WCJ.

On April 14, 2016, the undersigned WCJ issued his Findings of Fact & Order dated April 14, 2016 finding that the administrative director did not act without or in excess of its powers and that its determination was not the result of plainly erroneous express or implied findings of fact.

It is from these findings that the Applicant claims to be aggrieved.

**DISCUSSION:**

Pursuant to Labor Code § 4610.6(h):

> "The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:
>
> (1) The administrative director acted without or in excess of the administrative director's powers.
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> * * *
>
> (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to [§] 4610.5 and not a matter that is subject to expert opinion."

In addition, pursuant to Labor Code § 4610.6(i): "[i]n no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization."

Finally, the Medical Treatment Utilization Schedule (MTUS) is presumptively correct on the reasonableness of medical treatment [Labor Code § 4604.5(a)] It provides a scientific, evidence-based analytical framework for the evaluation and treatment of injured workers. [Labor Code § 4604.5(b)] Therefore, where a medical condition is not covered by the MTUS or if the MTUS is to be rebutted, other medical treatment guidelines or peer-reviewed studies must be used to justify the requested treatment. [Cal. Code Regs., tit. 8, § 9792.21(d)(1)]

In this case, as set forth by the undersigned WCJ in his Opinion on Decision dated April 14, 2016, on pages two to three:

> ". . . Kyle Landauer, M.D., the Applicant's primary treating physician, requested authorization for home assistance four hours per day five days per week. This was ultimately denied by the Administrative Director's Independent Medical Review (IMR) by way of Maximus Federal Services on November 18, 2015 [Defendant's Exhibit "B"] on page three on the following grounds:

> 'Per CA MTUS page 51 Home health services are Recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time or 'intermittent' basis, generally up to no more than 35 hours per week. Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed. (CMS, 2004). The patient does not have a medical condition that denotes the patient is homebound on part-time or full time basis; therefore the requested service is not medically necessary.'

However, the Applicant, in her Petition Appealing the Administrator's Director's Independent Medical Review Determination dated December 13, 2015, [EAMS Doc ID 58745733] contends that the determination resulted from 'plainly erroneous mistake of fact' in that 'the MTUS standard used is not applicable to the treatment being requested,' (1:27-28) that 'no MTUS standard exists for the type of home health care services requested,' (2:17-19) and erroneously claims that the burden is on the IMR reviewer to 'provide a detailed 'strength of evidence' rebuttal as required by Labor Code [§§] 4610.5 and 4604.5.'

However, the burden of proof is on the treating physician, not the IMR reviewer, to demonstrate that other evidence-based treatment guidelines allow the requested medical treatment. [Cal. Code Regs., tit. 8, § 9792.21(d)(2)] Pursuant to the Medical Evidence Search Sequence, if the MTUS does not apply, the treating physician must either use the most current version of the American College of Occupational and Environmental Medicine or the Official Disability Guides. If neither apply or stronger evidence is needed, other nationally recognized evidence-based treatment guidelines may be used. If none apply, then other nationally recognized, scientifically-based peer-reviewed medical journals may be used. [Cal. Code Regs., tit. 8, § 9792.21.1(a)(2)] Also, the treating physician must attach to his or her request for authorization the citation to the guidelines or studies that he or she wishes to use to justify the requested treatment. [Cal. Code Regs., tit. 8, § 9792.21.1(b)(1)(A)]

Here, Dr. Landauer failed to provide any other evidence-based treatment guidelines to justify his request for home assistance. Having failed to do so, both utilization review and IMR relied on the MTUS, presumptively deemed correct, in order to address the requested medical treatment.

Also, even assuming arguendo that the improper treatment guidelines were used by the IMR reviewer, that alone does not constitute a plainly erroneous finding of fact. [See Sabelberg v.

Department of Corrections Medical Facility (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 234, 7-8 (Appeals Board noteworthy panel decision); see also Willis v. State of California Department of Parks and Recreation (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 210, 9 (Appeals Board noteworthy panel decision)]

Therefore, for those reasons, the administrative director did not act without or in excess of its powers and its determination was not the result of plainly erroneous express or implied findings of fact."

Notwithstanding the undersigned WCJ's reasoning for his decision, the Applicant, in her Petition for Reconsideration, attacks it by claiming that "[t]he MTUS is inadequate when contemplating injured workers' need for homecare assistance," (3:19-20) that "based on the reporting from Dr. Landauer and Sally Glade . . . the ancillary homecare assistance services are medically necessary," (4:11-12) and that "[h]omecare should be an exception" to the Medical Evidence Search Sequence (5:10) because "[s]uch a standard is unreasonable for doctors to meet as they cannot cite medical sources that do not exist." (5:26-27) The Applicant further claims that "[e]ven if medical literature were to exist . . . the treating physician would have to spend much time, effort, and resources to find it." (5:28 to 6:1-2) As such, "the WCAB should identify . . . homecare assistance services as hybrid services that do not require justification by evidence-based or peer-reviewed literature . . . and not be subject to the UR/IMR process," (6:28 to 7:1-2) a process she describes as "nonsensical" (7:10) in "catastrophic cases" such as this one. (7:9)

Unfortunately, none of her claims constitutes a reasonable basis to disturb the undersigned WCJ's decision.

Therefore, for those reasons, the undersigned WCJ did not err in finding that the administrative director did not act without or in excess of its powers and that its determination was not the result of plainly erroneous express or implied findings of fact.

**RECOMMENDATION:**

The undersigned WCJ respectfully recommends that the Applicant's Petition for Reconsideration dated May 6, 2016 be denied.

Date: **May 10, 2016**

**DAVID L. POLLAK**
***WORKERS' COMPENSATION***
***ADMINISTRATIVE LAW JUDGE***