WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOCELYN BOWEN, ***Applicant,*** **vs.** **COUNTY OF SAN BERNARDINO, Permissibly Self-Insured, Adjusted By COUNTY OF SAN BERNARDINO RISK MANAGEMENT,** ***Defendant.***	**Case No. ADJ156419** **(San Bernardino District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration. In the Findings and Order issued by a workers' compensation administrative law judge (WCJ) on September 9, 2016, the WCJ granted applicant's appeal of the March 7, 2016 Independent Medical Review (IMR) Final Determination. The March 7, 2016 IMR determination upheld the Utilization Review (UR) denial of a prescription for Norco. The WCJ found that the IMR determination contained plainly erroneous findings and was without or in excess of the powers of the AD pursuant to Labor Code[1] sections 4610.6(h)(1) and 4610.6(h)(5). The WCJ rescinded the IMR determination, and ordered the dispute to a new IMR reviewer in the specialty of orthopedic surgery, pain management, and/or physical medicine and rehabilitation. In the Opinion on Decision, the WCJ also indicated that the new IMR reviewer should review the previous IMR determination.

The former acting Administrative Director[2] (AD) objected to the WCJ's instruction that the new IMR reviewer should review a previous IMR determination (dated November 23, 2015) approving the

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

[2] George Parisotto, former acting AD, was appointed AD on October 19, 2017.

prescription for Norco, arguing that review of a prior IMR final determination may detract from the independence of the new review. The AD agreed that the IMR reviewer should be in a specialty more appropriately matched to applicant's diagnosis, and submitted the matter for a new IMR determination.

We have reviewed the entire record in this matter, and we deem the AD's September 29, 2016 correspondence a Petition for Reconsideration.[3] We have considered the allegations set forth in the Petition, applicant's Answer thereto, and the WCJ's Report and Recommendation on Petition for Reconsideration (Report). On December 22, 2017, the WCJ issued an Amended Report, noting our decision after remittitur in *Stevens v. Outspoken Enterprises, Inc.* (May 19, 2017, ADJ1526353 [2017 Cal. Wrk. Comp. P.D. LEXIS 228].)

Based on our review of the record, and for the reasons discussed herein, we affirm the September 9, 2016 decision and remand this matter to the AD for submission of the medical dispute to a new IMR review pursuant to section 4610.6(i).[4]

FACTS

Applicant, while working as an employee service specialist on April 12, 2002, sustained industrial injury to her neck and right shoulder. Since at least March 9, 2015, applicant was prescribed, and she used, Norco to control her symptoms of pain.

On November 23, 2015, IMR issued a final determination letter in CM15-0186379 finding, as relevant here, that the prescribed Norco (10/325 mg #60) was medically necessary and appropriate. In the summary, the IMR reviewer, a specialist in pain management, physical medicine and rehabilitation, stated as follows:

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[3] We note that the F&O issued by the WCJ is a final order, decision and award because it determines a threshold issue, i.e., that applicant is entitled to a new IMR. It meets the well-accepted definition of finality. (E.g., a "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal. App. 3d 528, 534–535 [45 Cal. Comp. Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App. 3d 39, 45 [43 Cal. Comp. Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal. App. 4th 1068, 1070, 1075 [65 Cal. Comp. Cases 650, 650–651, 655–656].)

[4] Commissioner Frank Brass, who was on the Appeals Board panel that issued the order of September 9, 2016, has retired. Another panel member was assigned to take his place.

> The injured worker rates the pain 8-9 out of 10 on pain scale without medications and 4-5 out of 10 on the pain scale with medications . . . . The injured worker reports functional improvement and improvement in pain with medications. She notes improvement in activities of daily living (ADL) as well as increased ability to reach, lift, grab and hold as a result of her medication usage. (Joint Ex. 5, IMR final determination letter, 11/23/15, p. 4.)

The final determination letter set forth the rationale for the decision as follows:

> Within the documentation available for review, there is indication that Norco is reducing the patient's pain from 9/10 to 5/10, and improving functions of reaching, holding, and pulling associated with activities of daily living. In addition, the provider noted no side effects with current medication use, and a signed opioid document was completed in 11/2014 with a risk score of 0. Therefore, the request for continuation of Norco is reasonable and medically necessary. (*Id.*)

On December 21, 2015, applicant's treating physician, David L. Wood, M.D., submitted a request for authorization (RFA) for a Norco prescription, 10/325 mg #60. In the December 21, 2015 progress report (PR-2), Dr. Wood noted that applicant had continued neck and right shoulder pain and was using Norco twice a day. Without the use of medication, applicant reported to Dr. Wood her pain level was at a 9 out of 10, and with the medication, she rated her pain at level 5 or 6 out of 10. She also reported improvement with activities of daily living while using medication. Dr. Wood reviewed an opioid treatment agreement with applicant and determined that she met the criteria for continuation of medication management based on the MTUS.[5] (Joint Ex. 6.)

Defendant submitted the RFA to UR. After defendant's UR provider denied authorization, applicant timely requested IMR of that de-certification.

On February 19, 2016, applicant's attorney submitted to IMR the November 23, 2015 IMR final determination letter. (CM15-0186379.) (Joint Ex. 4, 5.) Applicant's attorney also submitted reports from Dr. Wood dated January 6, 2015; February 4, 2015; March 9, 2015; July 10, 2015; August 11, 2015; September 8, 2015; November 6, 2015; December 21, 2015; and January 25, 2016. (Joint Ex. 4.)

[5] MTUS is the acronym for the Division of Workers' Compensation's Medical Treatment Utilization Schedule. The MTUS, which is set forth in the California Code of Regulations, Title 8, section 9792.20 et seq., contains a set of guidelines that provide details on which treatments are effective for certain injuries, as well as how often the treatment should be given, the extent of the treatment, and surgical considerations.

The IMR reviewer was a family practice physician. The IMR determination (CM16-0016382) issued on March 7, 2016, and upheld the UR denial. The documents reviewed by the IMR reviewer included the application for IMR, the UR determination, the MTUS, and medical records from University Spine and Orthopedics, with dates of service from November 16, 2015 to January 25, 2016. The November 23, 2015 IMR final determination letter was not included, and there is no indication that the IMR reviewer considered it.

In the summary portion of the IMR determination, the physician noted applicant's subjective complaints of pain rated at 3-6 out of 10 with medication, and 8-9 out of 10 without medication. The IMR reviewer noted that, "Although the physician noted an improvement in the level of function with medication use, there was no documentation of any specific objective functional improvements with the use of Norco."

The rationale for the March 7, 2016 determination was as follows:

> Norco is a short acting opioid used for breakthrough pain. According to the [2009] MTUS guidelines, it is not indicated as 1st line therapy for neuropathic pain, and chronic back pain. It is not recommended for mechanical or compressive etiologies. It is recommended for a trial basis for short-term use. Long Term-use [*sic*] has not been supported by any trials. In this case, the claimant had been on Norco for a year without significant improvement in pain or objective improvement in function. There was no mention of Tylenol, Tricyclic or weaning failure. The continued use of Norco is not medically necessary.

Applicant timely appealed the IMR determination pursuant to section 4610.6(h). Defendant filed an answer. On July 19, 2016, the WCJ heard the appeal.

The issues were (1) whether the AD acted without or in excess of the AD's powers, and (2) whether the determination was the result of a plainly erroneous express or implied finding of fact that is a matter of ordinary knowledge based on information submitted for review and not a matter that is subject to expert opinion. The matter was submitted without testimony.

On September 9, 2016, the WCJ issued the disputed decision, granting applicant's appeal of the March 7, 2016 IMR final determination pursuant to sections 4610.5(h)(1) and (5).

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DISCUSSION

Section 4610.5 makes IMR applicable to "any dispute over a utilization review decision," and requires that any such dispute, "shall be resolved only" by IMR. The Medical Unit reviews UR plans and the IMR programs used to resolve disputes about medical treatment and medical-legal billing. The AD, although not a party to this action, is charged with oversight of Medical Unit programs that provide care to injured workers.

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the AD. The section explicitly provides that the AD's determination is presumed to be correct and can only be set aside by clear and convincing evidence of one or more of the following: (1) The AD acted without or in excess of the AD's powers; (2) The determination of the AD was procured by fraud; (3) The IMR reviewer was subject to a material conflict of interest that is in violation of section 139.5; (4) the determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability; or (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 section 4610.5 and not a matter that is subject to expert opinion. In upholding a challenge to the Constitutionality of section 4610.6, the Court of Appeal held that IMR determinations are subject to meaningful review, even if the Appeals Board cannot change medical necessity determinations, noting that "[t]he Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1100.)

Here, there is evidence that at least one component of the IMR determination is based on a plainly erroneous fact that is not a matter of expert opinion. On February 19, 2016, applicant's attorney submitted various reports from Dr. Wood (dated 1/6/15, 2/4/15, 3/9/15, 7/10/15; 8/11/15, 9/8/15, 11/6/15, 12/21/15, and 1/25/16). (Joint Ex. 4.) Applicant's attorney also submitted the November 23, 2015 IMR final determination letter. (CM15-0186379.) However, the list of documents reviewed by the IMR reviewer omits the reports from Dr. Wood dated January 6, 2015; February 4, 2015; and March 9, 2015.

Additionally, the November 23, 2015 IMR final determination letter (CM15-0186379) is not listed as a part of the IMR review. (Cal. Code Regs., tit. 8, § 9792.10.5(a)(1).) The record reflects that the IMR reviewer did not review all the documents submitted. The record does not reflect the reason these documents were not included in the IMR review or what information was contained in them. It is unknown whether the IMR organization failed to provide these records to the reviewer, or whether the physician reviewer ignored or overlooked them.

The IMR physician is obligated to look at all the submitted reports, and is obligated to consider the entire record. The IMR reviewer may not pick and choose portions of the required accompanying documents. Expert opinion is not needed in order to determine that the IMR decision in this case is incomplete, and therefore, defective. It is within the realm of ordinary knowledge to conclude that it was error for the IMR reviewer not to consider all of the records submitted.

The March 7, 2016 IMR Determination denied the request for authorization of Norco on the basis that "there is no documentation of any specific functional improvements with the use of Norco." The expert reviewer also stated that, "the claimant has been on Norco for a year without significant improvement in pain or objective improvement in functioning." (Exhibit 2, IMR final determination letter, 3/7/16, p. 3.)

However, these statements are incorrect because there is documentation of specific functional improvements in the records not considered by the reviewer. In the November 23, 2015 IMR final determination letter, the expert reviewer explained applicant's specific functional improvements, "Norco is reducing the patient's pain from 9/10 to 5/10, and improving functions of reaching, holding, and pulling associated with activities of daily living." (Joint Ex. 5, IMR final determination letter, 11/23/15, p. 4.) In his report dated December 21, 2015, Dr. Wood concurred that applicant experienced "improvement with activities of daily living while using their [*sic*] medication." (Exhibit 6, p. 2.)

Nonetheless, Dr. Wood's request for authorization of Norco was denied. A denial of authorization based upon a finding that there is "no documentation" when such documentation is, in fact, in the possession of the IMR reviewer is "a plainly erroneous express or implied finding of fact [as] a matter of ordinary knowledge based on the information submitted for review. . .and not a matter that is subject to

expert opinion" as described in section 4610.6(h)(5). It is also an action taken "without or in excess of the administrative director's powers" as described in section 4610.6(h)(1). (*Gonzalez-Ornelas v. County of Riverside* (April 6, 2016, ADJ4227596) 2016 Cal. Wrk. Comp. P.D. LEXIS 151; *Armenta v. San Bernardino Sheriff's Dept.* (October 5, 2017, ADJ803377) 2017 Cal. Wrk. Comp. P.D. LEXIS 460.) Here, the IMR reviewer ignored clear and convincing evidence that use of the prescribed opioid medications enables applicant to perform ADLs and reduces her pain levels. Without the medication, she has severe pain that impedes her ability to perform ADLs.

The authority of the Appeals Board to provide a remedy in this situation was recognized by the Court of Appeal in *Stevens, supra,* 241 Cal.App.4th 1074, wherein the Court wrote as follows:

> IMR determinations *are* subject to meaningful further review even though the Board is unable to change medical-necessity determinations. The Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. (§ 4610.6, subd. (h)(1) & (5).) These grounds are considerable and include reviews of both factual and legal questions. [F]or example… the Board could set aside the determination as based on a plainly erroneous fact. Similarly, the denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually *is* permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and would thus be reviewable. (§ 4610.6, subd. (h).) We therefore disagree with Stevens that the IMR process provides 'no means to address conflicts about what constitutes medical treatment' and no 'meaningful appeal to challenge an IMR decision based on an erroneous interpretation of the law.' (*Stevens, supra,* 241 Cal.App.4th at pp. 1100-1101, italics in original.)

Timely provision of reasonable medical treatment is an essential element of workers' compensation. (Cal. Const., Article XIV, § 4; *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93]; *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441]; *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566]; see also, Lab. Code, § 4600.)

Section 4610.6(i) provides in pertinent part as follows:

> If the [IMR] determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review

> organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization.

Accordingly, the dispute is remanded to the AD for submission to a different independent review organization or different reviewer as provided in section 4610.6(i). As part of the new IMR, applicant may re-submit the November 23, 2015 IMR final determination and all of Dr. Wood's reports to the IMR reviewer.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 9, 2016 Findings and Order is **AFFIRMED**.

IT IS FURTHER ORDERED that the medical treatment dispute is **REMANDED** to the Administrative Director of the Department of Industrial Relations pursuant to Labor Code section 4610.6(i) for submission of the dispute to independent medical review by a different independent review organization, or if a different independent medical review organization is not available after remand, the Administrative Director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. As part of the new review, the injured worker may submit the

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November 23, 2015 IMR final determination and all of the reports of his treating physician, David Wood, M.D., to the reviewer.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

K Zalewski - CHAIR

KATHERINE ZALEWSKI

Jose H. Razo

JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 20 2019

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

JOCELYN BOWEN
LAW OFFICE OF RICHARD SMITH
LAW OFFICE OF C. ROBERT BAKKE
DWC ADMINISTRATIVE DIRECTOR
COUNTY OF SAN BERNARDINO RISK MANAGEMENT

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