

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

ALICIA RODRIGUEZ, Applicant

vs.

**DYNAMIC EDGE CONSULTING; TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ10884813
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Order issued by the workers' compensation administrative law judge (WCJ) in this matter on July 26, 2023. In that decision, the WCJ found that the May 23, 2023 Health Assessment Report from Sue Coleman, R.N., was self-procured by applicant outside of defendant's Medical Provider Network (MPN). Further, applicant was ordered to participate in a Home Health Assessment with a provider selected by defendant from its MPN. All other issues were deferred.

Applicant contends that: 1) the WCJ erred in allowing the defendant to obtain a home health assessment because the defendant had already approved the medical treatment; and 2) the applicant has the right to choose her service provider and control her own medical treatment.

We received an Answer from defendant.

We received a Report and Recommendation (Report) from the WCJ, recommending that reconsideration be denied.

We have reviewed the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. Based upon our review of the record, and for the reasons discussed below, we will grant applicant's Petition for Reconsideration, rescind the F&O and substitute a

new F&O that does not include the order compelling applicant to attend the home health care assessment.

I.

Preliminarily, with respect to the timeliness of the petition having been filed more than 25 days after service of the Findings and Order and Opinion on Decision, we observe that there are 20 days allowed within which to file a petition for reconsideration from a “final” decision plus 5 calendar days if a party has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) In addition, if a party to be served is outside of California but within the United States, the time in which to act is 10 calendar days from the date of service, or 30 days total. (Cal. Code Regs., tit. 8, § 10605(a)(2).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

In this case, the Findings and Order of the WCJ was served on July 26, 2023, on all interested parties, including defendant Travelers, and their counsel Wolford & Associates, whose mailing addresses are Dallas, Texas, and St. Paul, Minnesota. Thus, applicant had until August 25, 2023 to file her petition. We therefore conclude that applicant’s petition is timely.

II.

Here, the facts are not in dispute. As stated above, applicant seeks reconsideration of the findings of the WCJ wherein he found that the home health assessment performed by Sue Coleman, R.N., which was requested on March 14, 2023 by applicant’s treating physician, Roger Bertoldi, M.D., and authorized by defendant on April 20, 2023 (Joint Exhibits H, I), was self-procured by applicant, and ordered applicant to undergo another home health assessment within the MPN.

Labor Code section 4050 states:

Whenever the right to compensation under this division exists in favor of an employee, he shall, upon the written request of his employer, submit at reasonable intervals to examination by a practicing physician, provided

and paid for by the employer, and shall likewise submit to examination at reasonable intervals by any physician selected by the administrative director or appeals board or referee thereof.

If there is an objection to the treating physician's opinion as to the issues of medical diagnosis, either party may obtain a qualified medical examination pursuant to section 4062. As noted by the Supreme Court in *Sandhagen*, if there is an objection to the treating physician's opinion as to the reasonableness or necessity of retroactive, concurrent, or prospective medical treatment, the employer's sole avenue for objection is to utilize section 4610. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 79 Cal. Rptr. 3d 171, 186 P.3d 535.) Here, defendant authorized the assessment, and there is nothing in the record to indicate that defendant objected to Dr. Bertoli's request. Thus, the issue is not whether applicant must undergo a medical legal evaluation pursuant to Labor Code section 4050, and Labor Code section 4050, and Labor Code section 5701, do not apply.

An industrially injured worker is entitled, at an employer's expense, to medical treatment that is reasonably required to cure or relieve the effects of the industrial injury. (Lab. Code, § 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, 203 [49 Cal.Comp.Cases 454].) "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 [72 Cal.Comp.Cases 1202]; and *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App. 452 [37 Cal.Comp.Cases 564].)

A home healthcare assessment is medical treatment, and as discussed below, it is clear from the record here that the parties followed the statutory framework for obtaining authorization for medical treatment in the form of a home health care assessment.

Labor Code section 4061.5 states that:

The treating physician primarily responsible for managing the care of the injured worker or the physician designated by that treating physician shall, in accordance with rules promulgated by the administrative director, render opinions on all medical issues necessary to determine eligibility for compensation.

Here, applicant's treating neurologist Dr. Bertoldi submitted a request for authorization for a home health care evaluation, which defendant then authorized.

Pursuant to Labor Code section 4610 et seq., an employer may establish an MPN, and here, there is no dispute that defendant had an MPN. In fact, when defendant issued its authorization for the home health care assessment, it noted that the home health care assessment should be obtained within its MPN. Under the circumstances here, the issue is not whether applicant sought to have defendant pay for the assessment by Sue Coleman, R.N. It is clear that defendant had the right to insist that medical care for which it was paying was obtained through the MPN. Instead, the issue is whether defendant can compel applicant to receive medical treatment in the form of an assessment.

Labor Code section 4056 states that:

No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury.

Under section 4056, an employee's unreasonable delay or refusal to accept or undergo medical treatment is supported when the employer makes a showing that (1) there is an unequivocal tender of adequate treatment by the employer; and (2) the risk of the treatment is inconsiderable in the light of the employee's medical condition. (See *Gallegos v. Workers' Comp. Appeals Bd.* (1969) 273 Cal.App.2d 569 [34 Cal.Comp.Cases 322] and *White v. Workers' Comp. Appeals Bd.* (1969) 270 Cal.App.2d 447 [34 Cal.Comp.Cases 168]. See also, *Coca-Cola Enterprises, Inc. v. Workers' Comp. Appeals Bd. (Bendanillo)* (2009) 74 Cal.Comp.Cases 1180 (writ den.).)

Here, there has been no showing that "the risk of the treatment is inconsiderable in the light of the employee's medical condition." Accordingly, there is no basis to compel applicant to undergo another home health care assessment.

Labor Code section 4605 states:

Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.

Under this section, an employee remains responsible for the expense of this report. However, it also directs a qualified medical evaluator or authorized treating physician to address such reporting and indicate whether they are in agreement with such findings or opinions. Accordingly, the assessment obtained by applicant should have been forwarded to treating neurologist Dr. Bertoldi.

We observe that if Dr. Bertoldi then opines that home health care treatment is reasonable and necessary, the parties can then follow the appropriate procedures in Labor Code sections 4610 et seq. and 4614 et seq., as to whether defendant should authorize and pay for the recommended treatment.

Accordingly, we grant applicant's Petition for Reconsideration, rescind the F&O and substitute a new F&O that does not include the order compelling applicant to attend the home health care assessment.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued on July 26, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration that the Findings of Fact and Order issued on July 26, 2023 by a workers' compensation administrative law judge are **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. ALICIA RODRIGUEZ while employed on 04-27-2017 as an account executive at Oxnard, California, by DYNAMIC EDGE CONSULTING, whose workers' compensation insurance carrier was TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, sustained injury arising out of and occurring in the course of employment to her brain.
2. The May 23, 2023 Home Health Assessment Report from Sue Coleman, R.N., was self-procured by applicant outside of defendant's Medical Provider Network.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 20, 2023

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

**ALICIA RODRIGUEZ
SOLOV AND TEITELL, A.P.C.
WOOLFORD ASSOCIATES**

LAS/AS/ara

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

CASE NUMBER: ADJ10884813

ALICIA RODRIGUEZ

-vs.-

DYNAMIC EDGE
CONSULTING;
TRAVELERS PROPERTY
CASUALTY COMPANY OF
AMERICA;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Andrew Malagon

DATE: August 29, 2023

**REPORT AND RECOMMENDATION ON APPLICANT'S PETITION FOR
RECONSIDERATION**

**I
INTRODUCTION**

1. Applicant's Occupation : Account Executive
Applicant's Age : 28 Years
Date of Injury : 4-27-2017
Parts of Body Injured : Brain
2. Identity of Petitioner : Applicant filed the Petition.
Timeliness: The petition **was not** timely filed.
Verification: The petition is verified.
3. Date of Findings of Fact : July 26, 2023
4. **Petitioner's Contentions:**
Applicant contends:
 - (a) The WCJ does not have jurisdiction to compel applicant to participate in a home health assessment.

II **FACTS**

Applicant while employed by Dynamic Edge Consulting sustained injury arising out of and occurring in the course of employment to her brain. Applicant's treating physician, Dr. Roger Bertoldi, issued a Request for Authorization on March 14, 2023 seeking a home health evaluation (JOINT EXHIBIT I). Defendant authorized the home health evaluation on April 20, 2023 with the place of service listed as "MPN Providers" (JOINT EXHIBIT H). A home health assessment was conducted by Sue Coleman R.N. on May 23, 2023 (JOINT EXHIBIT J). On June 16, 2023 Defendant issued a letter to Dr. Bertoldi indicating that Defendant has objected to the report of Sue Coleman R.N. and requesting Dr. Bertoldi defer review of the report until Defendant is able to obtain their own home health assessment (JOINT EXHIBIT G). Defendant submitted a TravNet MPN provider listing for zip code 90731 with four pages of home health care providers (DEFENDANT'S EXHIBIT A). Per the Application for Adjudication, Applicant's zip code is 90731. Sue Coleman R.N. does not appear on the MPN list provided by Defendant. Applicant did not submit any evidence to establish that Sue Coleman R.N. was in Defendant's MPN nor did they submit any evidence to support that Defendant's MPN lacked providers willing to conduct a home health assessment. Although Defendant's authorization did not specifically state that the home health assessment was to be conducted with a MPN provider, the fact that the place of service is listed as MPN Providers reasonably should have put Applicant's counsel on notice that the evaluation was authorized for a MPN provider (JOINT EXHIBIT H).

The matter proceeded to trial on July 12, 2023. The main issue before this Court was whether Defendant could compel Applicant to participate in a home health care assessment. On July 26, 2023 this Court issued its Findings of Fact in which it was found that Applicant self-procured their own home health care assessment outside of Defendant's Medical Provider Network. Applicant was ordered to participate in a home health assessment with a provider selected by Defendant from their Medical Provider Network. It is from this order that Applicant seeks reconsideration.

III

DISCUSSION

Timeliness of Petition

Pursuant to Labor Code 5903 a party can file a Petition for Reconsideration within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge. Pursuant to California Code of Regulations 10605(a)(1), when any document is served by mail, fax, email, or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended by five calendar days from the date of service, if the place of address and the place of mailing of the party, attorney, or other agent of record being served is in within California.

Pursuant to California Code of Regulations 10615(b) a document is deemed filed on the date it is received, if received prior to 5:00 p.m. on a court day. A document received after 5:00 p.m. on a court day shall be deemed filed as of the next court day. Pursuant to California Code of Regulations 10206.3(a) an electronically transmitted document shall be deemed to have been received by EAMS when the electronic transmission of the document into EAMS is complete. A document received electronically after 5:00 pm of a court day (i.e., Monday through Friday, except designated State holidays) shall be deemed filed as of the next court day.

The Findings and Order and Opinion on Decision were served by the Court on July 26, 2023 and included service to Applicant attorney's address which is in California. Applicant's Petition for Reconsideration was received into EAMS on August 21, 2023 at 6:04PM¹, and therefore deemed to have been filed on August 22, 2023 in accordance with California Code of Regulations 10206.3(a). Applicant had 25 days after the date of service of the Findings and Order and Opinion on Decision to timely file their petition in accordance with Labor Code 5903 when taken in conjunction with California Code of Regulations 10605(a)(1). Applicant's petition is deemed to have been filed more than 25 days after service of the Findings and Order and Opinion on Decision, and therefore is untimely².

Order Compelling Applicant to Participate in a Home Health Assessment

Applicant's main contention is Applicant cannot be compelled to participate in a home health assessment because the Court does not have jurisdiction to compel the applicant to an evaluation beyond what is set forth in Labor Code 4600.

Labor Code 4050 states "Whenever the right to compensation under this division exists in favor of an employee, he shall, upon the written request of his employer, submit at reasonable intervals to examination by a practicing physician, provided and paid for by the employer, and shall likewise submit to examination at reasonable intervals by any physician selected by the administrative director or appeals board or referee thereof." In *Andrade v. Diamond Contract Servs.*, 2011 Cal. Wrk. Comp. P.D. LEXIS 99 (Cal. Workers' Comp. App. Bd. February 18, 2011), which this Court found to be persuasive, the WCAB addressed the issue of whether an applicant could be compelled to submit to an evaluation by a defense vocational expert. The WCAB explained,

¹ Applicant filed their Petition for Reconsideration twice. Per EAMS the first filing was received on 8/21/2023 at 6:04PM. The second filing was received on 8/22/2023 at 8:00AM. Both filings are late.

² The 25th day post service of the decision was Sunday 8/20/2023. In accordance with CCR 10600(b) applicant had until the next business day, 8/21/2023, to file their petition. The petition was late.

“discovery is intended to be a two-way street and that mutual discovery should be allowed as a matter of fundamental fairness. Furthermore, the Labor Code permits a defendant to require an employee to submit to a medical evaluation by a practicing physician (section 4050) and also permits the Appeals Board to direct an unrepresented employee to be examined by a qualified medical evaluator (section 5703.5). Even though these statutes do not expressly authorize evaluation by a vocational expert, they do not expressly prohibit it.”

Likewise in the case at hand, although statute does not grant a Judge the ability to compel a home health assessment, it does not expressly prohibit it. The WCAB referenced Labor Code 4050 and 5703.5 as part of its reasoning as to why a vocational expert evaluation could also be compelled. This Court was persuaded by the analysis of the WCAB and even finds a more compelling reason to compel the evaluation in the case at hand. Here the requested evaluation is a home health assessment with a registered nurse which is arguably more closely related to a physician evaluation under Labor Code 4050 than that of a vocational expert who is not necessarily required to undergo medical training.

In *Holz v. Workers' Comp. Appeals Bd.*, 78 Cal. Comp. Cases 484 (Cal. App. 2d Dist. April 25, 2013, Writ Denied), the WCAB addressed whether an applicant could be compelled to submit to a defense evaluation by a vocational expert. The WCAB found that while there was no explicit statutory authority to compel the evaluation with the defense vocational expert, Labor Code 5708 and California Code of Regulations 10348 (re-numbered to 10330) do grant a workers' compensation judge and the Appeals Board the ability to compel an applicant to attend an evaluation of a vocational expert where the applicant has placed rebuttal of the DFEC adjustment in issue.

Labor Code 5708 states in relevant part “All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice

and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division” California Code of Regulations 10330 states in relevant part “In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case.”

Although the above cases are regarding vocational expert evaluations, both discuss a Judge's ability to issue an order compelling where there is no specific statutory authority permitting a Judge to do so. Under Labor Code 5708 a workers' compensation judge is empowered to make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. Furthermore, a workers' compensation judge has full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case. Here the Court found that since Applicant self-procured their own home health assessment outside of Defendant's MPN with a provider of their choosing, and in the interest of fundamental fairness, that Defendant also be allowed to obtain their own health care assessment with a provider of their choosing from the MPN. Allowing Defendant to obtain their own home health assessment is not meant to circumvent the medical legal process, and any report issued as a result of that evaluation would not act as a final determination on Applicant's need for home health care. Even Applicant's self-procured home

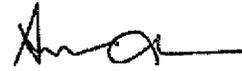
health assessment report would need to be reviewed by the primary treating physician under Labor Code 4605 as it could not be the sole basis of an award for compensation. Under California Code of Regulations 9785 it is the treating physician who will make any prescriptions for home health care, and utilization review who will review the request and make a determination on the requested treatment. Therefore there is no prejudice to Applicant in allowing Defendant's home health assessment to proceed forward.

IV

RECOMMENDATION

For the reasons stated above, it is respectfully requested that Applicant's Petition for Reconsideration be denied.

DATE: 8-29-2023



Andrew Malagon

WORKERS' COMPENSATION JUDGE

Served: 8/29/2023 See attached Proof of Service
By: Mgray