WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELAINE HACKER, *Applicant,* **vs.** **COUNTY OF SAN BERNARDINO-PUBLIC HEALTH DEPARTMENT, Permissibly Self-Insured,** *Defendants.*	**Case No. ADJ422252 (SBR 0302367)** **(San Bernardino District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

DOCUMENT #1 BEGINS HERE

Defendant's petition for reconsideration of the March 26, 2014 Findings And Order of the workers' compensation administrative law judge (WCJ) was earlier granted in order to further study the issues presented. In her decision the WCJ upheld applicant's three Labor Code section 4610.6(h) appeals of five Independent Medical Review determinations (IMR Determinations), and ordered the treatment disputes remanded to the Administrative Director (AD) for new IMRs as provided in Labor Code section 4610.6(i).[1]

The WCJ's order is based upon her Finding 1 that, "it is unclear if the reviewing physicians reviewed all the appropriate and relevant medical records, as the listing of information reviewed is not specific as to dates of reports and names of reporting physicians," and her Finding 2 as follows:

> A failure to review all the appropriate and relevant medical records is sufficient to make a finding as a matter or ordinary knowledge that the determination was the result of a 'plainly erroneous express or implied finding of fact' since the failure to have a complete history and a failure to

[1] Further statutory references are to the Labor Code.

Section 4610.6(i) provides in full as follows: "If the 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. In 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."

> review all relevant and appropriate medical records is a basis to find a determination does not reach the level of substantial evidence.

It was previously stipulated on May 4, 2005 that applicant sustained industrial injury to her low back, left elbow and right knee while employed by defendant as a registered nurse during the period from 1972 to January 24, 2001, causing permanent disability and a need for future medical treatment.

Defendant contends that the WCJ erred in finding that the IMR Determinations were based upon plainly erroneous findings of fact, and further contends that applicant's IMR pleadings should have been dismissed by the WCJ because they were presented on double-sided paper without proper verification.

An answer was received from applicant. The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

The WCJ's March 26, 2014 findings are rescinded and her order is reversed as the Decision After Reconsideration. The WCJ's findings that the IMR Determinations are not "substantial evidence" because they do not specifically identify the date and author of each report reviewed as part of the IMR process do not support the order setting aside the IMR Determinations due to a "plainly erroneous express or implied finding of fact" as described in section 4610.6(h)(5).[2] A new finding is entered that applicant did not establish grounds for her IMR appeals under section 4610.6(h). It is further ordered that the IMR Determinations are final and binding decisions that the proposed medical treatments are not reasonably required and defendant is not obligated to provide them. In light of the above disposition,

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[2] Section 4610.6(h) provides in full as follows:

"A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. 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. (2) The determination of the administrative director was procured by fraud. (3) The independent medical 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. (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."

defendant's contentions regarding the use of double sided paper and the form of verifications on the IMR appeals are not further addressed, other than to state that those are not reasons for the decision.

BACKGROUND

The WCJ describes the background facts and reasons for her decision in pertinent part in the Report as follows:

> By way of background, applicant, a registered nurse, sustained an industrial injury to the low back, left elbow and right knee during the period 1972 through 1/24/2001. Treatment was recommended by applicant's primary treating physician, Dr. Hesseltine, who set his recommendations forth in various reports, dated 11/8/13, 2/3/14, and 4/1/14 and in various [Requests For Authorizations] RFAs. These recommendations were denied by defendant's Utilization Reviews [UR] and referred for IMR, which submitted IMR final determination letters dated 10/16/14, 9/23/14, 9/17/14, 9/12/14 and 9/914. Applicant filed the instant Appeal of Determination of the Administrative Director – IMR on 10/9/2014, and an amended to Petition Appealing AD-IMR Determination on 11/25/14. Defense has filed Objections to applicant's appeals, dated 10/20/14 and 11/25/14…
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> In the instant matter, applicant is asserting that the physician reviewers at [the IMR organization] Maximus did not consider the provisions of Appendix D of the MTUS (Chronic Pain Medical Treatment Guidelines), which has resulted in what he perceives to be a plainly erroneous Finding of Fact as to the standard of care with respect to the prescriptions prescribed. Applicant also contends that Maximus did not provide to their physician reviewers all the medical records submitted by the parties and did not provide an explanation as to why two physician reviewers were provided documents, while two other reviewers were not (in CM14-0104199 and CM14-010555).
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> Applicant also asserts that in regard to CM14-0071349, the reviewer stated that the mechanism of injury wasn't provided within the documentation available for review, however, this was one of the reviewers who was provided the initial report from the AME, Dr. Uppal, which does provide a history and mechanism of injury. Applicant asserts this is a clearly erroneous finding. Applicant also contends that the retrospective review of treatment from 7/8/12 – 12/27/13, the subject of CM14-0071349, is far outside the UR standards and time frames per [Cal. Code Regs., tit. 8, § 9792.9.1(c)(4)].
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> In regard to CM14-0104199, the specialty of the reviewing physician is Emergency Medicine. Applicant contends that having a reviewer with this specialty is inappropriate insofar as applicant is dealing with chronic pain. Additionally applicant contends this reviewer was not provided the medical file to review, and that the retrospective review of the treatment provided (between 2/5/14 and 3/5/14) was far outside the UR standards and time frames per [Cal. Code Regs., tit. 8, § 9792.9.1(c)(4)].
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> In regard to CM14-0100222, applicant contends that the physician reviewer utilized the incorrect standard for continuation of opioid

> medication, stating '...the cardinal criteria for continuation of opioid therapy include evidence of successful return to work, improved function and/or reduced pain...' and applicant arguing there is no 'cardinal criteria' in the MTUS, making the determination plainly erroneous.
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> Applicant contends that the determinations issued by the Administrative Director regarding applicant's treatment needs, both retrospectively and prospectively, cannot be relied upon as the reviewers did not consider the medical history, omitted medical records, performed incomplete reviews of the medical records, had no insight into the medical condition being treated, applied incorrect standards, and based their determinations on erroneous findings of fact.
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> While applicant wishes for the Guidelines for Prescribing Controlled Substances be considered by this judge in rendering her decision, this document is NOT contained in the MTUS and has not been adopted by the State Legislature or Administrative Director as has the Medical Treatment Utilization Schedule, which is determined to be the premier reference in medical treatment determinations.
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> Defendant, on the other hand, asserts that both their UR determinations and the IMR determinations were timely and did not suffer from any material procedural defect that would undermine the integrity of the decisions... (Bracketed material substituted or added.)

The WCJ concludes the Report by reiterating for each of the IMR Determinations that it is "defective insofar as it is not clear whether or not the reviewing physician reviewed all the appropriate and relevant medical records," and further writing for each as follows:

> A listing of information reviewed which is not specific as to dates of reports and names of reporting physicians is insufficient and does not provide this judge with sufficient information as to what, exactly, was reviewed. A failure to review all the appropriate and relevant medical records is sufficient to make a finding that 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 per [section] 4610.5 and not a matter that is subject to expert opinion.' (Bracketed material substituted.)

DISCUSSION

Before addressing defendant's contentions, we note that the WCJ's decision is not a final order that determines a substantive right or liability of those involved in the case, and it is not properly subject to reconsideration. (Lab. Code, § 5900.) Instead, the WCJ's March 26, 2014 order is an interim order, like an intermediate procedural or evidentiary decision, which does not decide a threshold issue. (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528 [45

Cal.Comp.Cases 410]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650].) However, the earlier grant of reconsideration was not inappropriate because reconsideration is not available to challenge any new IMR determinations. For that reason, removal would have been ordered on motion of the Appeals Board in furtherance of defendant's petition if reconsideration had not already been granted. (Lab. Code, § 5310; Cal. Code Regs., tit. 8, §10843.)

Turning to the substance of the WCJ's decision, we do not agree that there is a "plainly erroneous express or implied finding of fact...of ordinary knowledge based on the information submitted for review" as described in section 4610.6(h)(5) and as concluded by the WCJ. An IMR determination need not state the author and specific date of each and every medical report reviewed as found by the WCJ. Such a description of reviewed reports determines nothing and is not a "finding of fact." Section 4610.6(e) specifically distinguishes between a description of documents and "findings" by providing that an IMR determination "cite the employee's medical condition, *the relevant documents* in the record, *and the relevant findings*" that support the determination. (Emphasis added.) Nothing in the IMR statute requires that an IMR determination state the author and specific date of each and every report reviewed and AD Rule 9792.10.6(d) provides only that an IMR determination contain a "list of the documents reviewed." (Cal. Code Regs., tit. 8, § 9792.10.6(d).)

In this case, the IMR Determinations list the documents reviewed by name of provider and by the range of the provider's dates of service. The documents are further identified as being submitted by the Claims Administrator or by the injured worker. Stating the time range covered by the provider's reports is a sufficient listing of reports reviewed as part of the IMR process. Neither the IMR statute nor the AD Rules requires anything more.

But even if we accepted the WCJ's view that an IMR determination should state the specific date of each reviewed report, the lack of such a statement of dates in the IMR Determinations is not a "plainly erroneous express or implied finding of fact...of ordinary knowledge... and not a matter that is subject to expert opinion" as described in section 4610.6(h)(5) and as found by the WCJ. To the contrary, nothing about the identification of reports by date and author involves a finding based upon "ordinary knowledge." This is illustrated in this case, where the WCJ decided that the IMR Determinations are not "substantial evidence" because they did not "provide this judge with sufficient information as to what, exactly, was reviewed." The WCJ's second guessing of the substantiality of the IMR reviewer's expert medical opinion is not a determination that there is a plainly erroneous finding of fact in the IMR Determinations. It is a determination that the IMR reviewers did not correctly evaluate the medical necessity of the proposed treatments, and such a determination is expressly prohibited by section 4610.6(i), which provides that "[i]n no event" shall a WCJ "make a determination of medical necessity contrary to the determination of the independent medical review organization."

The record establishes no grounds for granting applicant's section 4610.6(h) appeals of the IMR Determinations, and the WCJ's contrary March 26, 2014 decision is reversed. It is further ordered that the IMR Determinations are final and binding decisions that the requested medical treatments are not medically necessary.

Lastly, defendant's counsel is admonished for citing *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon I*) as controlling authority concerning the validity of a UR determination. As counsel correctly noted, an en banc decision of the Appeals Board is binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].) However, the holding in *Dubon I* was expressly superseded by the holding of the Appeals Board in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.) (*Dubon II*). In *Dubon II*, the Appeals Board majority did affirm the holding in *Dubon I* that an untimely UR decision is invalid, but further held that *all* other disputes concerning UR must be addressed through the IMR process.

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The WCJ's March 26, 2014 decision is reversed and a new finding is made that applicant did not establish grounds for her IMR appeals under section 4610.6(h). It is further ordered that the IMR Determinations at issue are final and binding decisions that the requested medical treatments are not medically necessary.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 26, 2014 Findings And Order of the workers' compensation administrative law judge is **RESCINDED** and the following is substituted in its place:

FINDINGS OF FACT

1. Applicant did not establish grounds for setting aside any of the five IMR Determinations in her appeals pursuant to Labor Code section 4610.6(h), and all five IMR Determinations are final and binding decisions that the proposed medical treatment they address is not medically necessary.

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IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the five IMR Determinations challenged by applicant are final and binding decisions that the proposed medical treatment they address is not medically necessary.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

KATHERINE ZALEWSKI

I CONCUR AND DISSENT (See Separate Concurring And Dissenting Opinion),

RONNIE G. CAPLANE

WORKERS' COMPENSATION APPEALS BOARD SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 23 2015

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

ELAINE HACKER
LAW OFFICES OF LOUIS SEAMAN
LAW OFFICES OF RICHARD SMITH

MB

JFS/abs

DOCUMENT #2
BEGINS HERE

CONCURRING AND DISSENTING OPINION OF CHAIRWOMAN CAPLANE

I agree with the majority that the WCJ's March 26, 2014 decision is not properly subject to reconsideration because it is not a "final order, decision, or award" as described in section 5900. However, I dissent from the majority's conclusion that the earlier grant of reconsideration need not be rescinded because there is a basis for ordering removal of the case to the Appeals Board pursuant to section 5310 and Appeals Board Rule of Practice and Procedure, Rule 10843. (Cal. Code Regs., tit. 8, §10843.) In my view, there is no basis for removal and the WCJ's March 26, 2014 decision should be affirmed.

Unlike reconsideration, removal is an extraordinary remedy that is only available when a decision will result in "significant prejudice" and/or "irreparable harm" to a party. (Cal. Code Regs., tit. 8, §10843(a); *Swedlow, Inc. v. Workers' Comp. Appeals Bd.* (*Smith*) (1983) 48 Cal.Comp.Cases 476 [writ den.]; *Kleemann v Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 224, footnote 2 [70 Cal.Comp.Cases 133].)

In this case, defendant would incur no significant prejudice or irreparable harm if new IMRs are conducted as ordered by the WCJ. There is no additional cost to defendant for the new IMRs because they were ordered by the WCJ pursuant to section 4610.6(i) following applicant's successful section 4610.6(h) appeal of the IMR Determinations. (See Cal. Code Regs., tit. 8, § 9792.10.7(d).) Moreover, the new IMRs could only reach one of two conclusions. The first is that the requested treatment is unnecessary, which causes defendant no prejudice. The second is that the treatment is reasonably required and is the obligation of the defendant to provide, which also causes no prejudice to defendant because that is already its obligation under the law. (Lab. Code, § 4600.)

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I would rescind the grant of reconsideration and affirm the March 26, 2014 decision of the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE, CHAIRWOMAN

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 23 2015

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

ELAINE HACKER
LAW OFFICES OF LOUIS SEAMAN
LAW OFFICES OF RICHARD SMITH

JFS/abs