WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BELINDA GO, *Applicant,* **vs.** **SUTTER SOLANO MEDICAL CENTER, permissibly self-insured,** *Defendant.*	**Case No. ADJ10168011** **(San Francisco District Office)** **OPINION AND ORDER DENYING DEFENDANT'S PETITION FOR RECONSIDERATION**

Applicant admittedly sustained industrial injury to her neck while working for defendant as a registered nurse on June 9, 2013. Defendant seeks reconsideration of the July 12, 2017 Findings And Award of the workers' compensation administrative law judge (WCJ) who found that applicant sustained a period of compensable temporary disability as a result of the surgery she self-procured to treat her injury after authorization for the surgery was denied by defendant's utilization review (UR) and after an Independent Medical Review (IMR) decision upheld the UR denial.

Defendant contends in its Petition For Reconsideration (Petition) that the WCAB exceeded its jurisdiction in finding that the cervical spine surgery applicant self-procured was medically reasonable based upon the opinion of the parties' Panel Qualified Medical Evaluator (PQME), Marvin Zwerin, D.O. Defendant contends that it is not liable for temporary or permanent disability resulting from the spine surgery because it was not authorized by defendant, and that the WCJ found an incorrect permanent and stationary date based upon the surgery.

An answer was received from applicant.

The WCJ provided a Report & Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be denied.

Following issuance of the Report, defendant requested to file an "Addendum To Petition For Reconsideration" to respond to statements in the Report and to provide an additional case citation.

Defendant's request is approved and the supplemental pleading is received. (Cal. Code Regs., tit. 8, § 10848.)[1]

Having carefully reviewed the record and pleadings, reconsideration is denied for the reasons expressed by the WCJ in her Report, which is incorporated by this reference, and for the reasons below. An injured worker is entitled to indemnity for temporary and permanent disability resulting from reasonable medical treatment of an industrial injury, and this does not change if the treatment is self-procured. Defendant's obligation to provide the surgery as medical treatment was finally addressed in the UR and IMR decisions, and those decisions are not now before the WCAB. The findings of the permanent and stationary date and 27% permanent disability are supported by the reporting of PQME Dr. Zwerin, which is substantial medical evidence, and the award of temporary disability indemnity is correct because it was shown that the treatment applicant self-procured relieved the effects of her industrial injury and is reasonable.

BACKGROUND

The underlying facts are not in dispute. Applicant sustained industrial injury to her neck while working for defendant as a registered nurse on June 9, 2013.

On May 7, 2015, one of applicant's treating physicians, Christopher Neuberger, M.D. submitted a request for authorization (RFA) for cervical spine surgery and related treatment and services. (Defendant's Exhibit H.) The RFA was submitted by defendant to its UR provider, which denied authorization through a report by Sloane Blair, M.D. (Defendant's Exhibits D, E and F.) Applicant obtained IMR pursuant to Labor Code section 4610.5, but the UR denial was upheld in a July 22, 2015 IMR determination.[2] (Defendant's Exhibit G.)

On September 11, 2015, applicant's condition was found to be permanent and stationary following the UR denial by her primary treating physician, G. Jude Shadday D.O. (Defendant's Exhibit

[1] Rule 10848 provides as follows: "When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party."

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

C.) Dr. Shadday referred applicant to Mark Cohen M.D. to prepare a report describing her permanent disability. (Defendant's Exhibit A.) In his December 8, 2015 report, Dr. Cohen opined that applicant's neck disability caused 5% whole person impairment (WPI), which rated 7% permanent disability after apportionment of 20% to nonindustrial factors. (*Id.*)

Applicant returned to work for a period of time until March 22, 2016, and experienced increased symptoms during that time. (Applicant's Exhibit 1.) On March 28, 2016, applicant followed Dr. Nueberger's recommendation for cervical spine surgery and self-procured it from Jason Huffman, M.D. (*Id.*)

On August 1, 2016, applicant was evaluated by PQME Dr. Zwerin, who found that applicant's condition became permanent and stationary on July 28, 2016, four months after the surgery. (Applicant's Exhibits 1 and 2.) Dr. Zwerin further determined that applicant's neck disability caused 17% WPI and that 20% of the permanent disability is properly apportioned to nonindustrial factors. (*Id.*) Defendant does not dispute that Dr. Zerwin's report results in a permanent disability rating of 23% after apportionment.

Defendant disputed the determination of Dr. Zwerin and argued that because authorization for the cervical spine surgery was denied through the UR and IMR processes that it has no liability for permanent or temporary disability that the surgery caused. Defendant further contends that the pre-surgery reporting of Dr. Cohen should be followed to award 7% permanent disability. The dispute was presented to the WCJ for determination at trial on May 15, 2017, as shown by the Minutes of Hearing (MOH) from that date.

Following the trial the WCJ issued her July 12, 2017 decision as described above, finding that applicant was entitled to temporary disability indemnity for a period of time following the cervical spine surgery, and finding that the industrial injury caused 23% permanent disability after apportionment, as opined by PQME Dr. Zwerin. In her Report, the WCJ explains that she determined that applicant was entitled to the indemnity awarded for temporary disability and permanent disability following the surgery because the treatment proved to be reasonable by its positive outcome. She also found the reporting of Dr. Zwerin to be substantial medical evidence and more persuasive on the question of applicant's

permanent disability than the reporting of Dr. Cohen.

In reaching her decision, the WCJ notes her reliance upon the reasoning of the Appeals Board panel in *Barela v. Leprino Foods* (September 25, 2009, ADJ3226482) [2009 Cal. Wrk. Comp. P.D. Lexis 482] (*Barela*)[3], and quotes from that decision in her Report as follows:

> No statute prohibits an injured worker from self-procuring medical treatment. For workers' compensation purposes the issue when medical treatment is self-procured is whether the employer is liable for the reasonable cost of the treatment. (See *McCoy* v. *Industrial Acc. Com.* (1966) 64 Cal.2d 82 [31 Cal.Comp.Cases 93]; *Montyk v. Workers' Comp. Appeals Bd.* (1966) 245 Cal.App.2d 334; *Knight v. Liberty Mutual Ins. Co,*(2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc); *Kagome Foods v. Workers' Comp. Appeals Bd. (Saladara)* (1999) 64 Cal.Comp.Cases 451 (writ den.).) Here, section 4062(a) relieves defendant of liability for the cost of the lumbar surgery applicant self procured, but that is all that section provides.
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> With regard to permanent disability, section 4660 mandates use of the AMA Guides and the 2005 Schedule. [*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz*).] Nothing in section 4660, the AMA Guides, or the 2005 Schedule limits an applicant's entitlement to permanent disability indemnity merely because a treating physician's request for authorization to perform spinal surgery was at some point lawfully denied, or because the employee at some point reasonably self-procured the surgery.
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> Moreover, defendant did not rebut the presumption under section 4660 that the 2005 Schedule 'shall be prima facie evidence of the percentage of permanent disability' to be attributed to an injury. Showing that an employee self-procured medical treatment is not evidence within 'the four corners of the AMA Guides' that contradicts and overcomes the prima facie correctness of the permanent disability rating calculated by the DEU using the AMA Guides and the 2005 Schedule. (*Almaraz, supra.*) It also makes no difference that the surgery was not authorized pursuant to the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM guidelines), or that it

[3] Defendant asserts in the Petition that the WCJ erred in citing *Barela* because the Court of Appeal issued an unpublished opinion (2010 Cal. Wrk. Comp. LEXIS 81) denying the defendant's petition for writ of review of the Appeals Board panel decision in that case, and California Rules of Court, Rule 8.115 prohibits the citation to unpublished opinions of the Court of Appeal. Defendant includes an incorrect citation to *Barela* in making that assertion and misconstrues the law. In her Report and Opinion on Decision, the WCJ informally cites and quotes from the Appeals Board's panel decision in *Barela* as published at "2009 Cal. Wrk. Comp. P.D. Lexis 482," and as summarized as a "writ denied" decision at 75 Cal.Comp.Cases 415. A "writ denied" decision like *Barela* is not binding precedent and does not have stare decisis effect, but it is properly cited as authority for the holding of the Appeals Board in the underlying decision. (*Farmers Ins. Group of Companies v. Workers' Comp. Appeals Bd.* (*Sanchez*) (2002) 104 Cal.App.4th 684, 689, fn. 4 [67 Cal.Comp.Cases 1545]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745]; *Tapia v. Skill Masters Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc).)

> was self-procured. This is because Dr. Ansel expressly concluded in his November 12, 2007 report, albeit in hindsight, that the surgery 'was both reasonable and necessary.' That conclusion is supported by applicant's credible testimony that the surgery relieved the symptoms of his back injury. Thus, the other effects of the surgery were fairly considered by Dr. Ansel in his evaluation of applicant's permanent disability under the AMA Guides. (*Barela, supra,* 2009 Cal. Wrk. Comp. P.D. Lexis 482 *10-12.)

DISCUSSION

In opposition to the WCJ's reliance on *Barela*, defendant cites to the Appeals Board panel decision in *Ribeiro v. Workers' Comp. Appeals Bd.* (2015) 80 Cal.Comp.Cases 1222 [2015 Cal. Wrk. Comp. LEXIS 122] (writ den) (*Ribeiro*).

In *Ribeiro*, the panel held that the applicant was not entitled to indemnity for temporary disability caused by an unauthorized surgery performed to treat the industrial condition. In reaching that decision, the panel cited the reasoning in *Barela*, albeit to conclude that the claimed period of temporary disability was not compensable. The panel in *Ribeiro* distinguished the facts in that case from *Barela* by noting that the parties' AME in *Barela* initially determined that the surgical procedure was unnecessary, but changed his opinion and concluded the surgery was reasonable based upon its favorable outcome. (See, *Riberio v. Gus JR Restaurant* (May 19, 2015, ADJ6847126) [2015 Cal. Wrk. Comp. P.D. LEXIS 310].) By contrast, the AME in *Ribeiro* opined that the worker's self-procured surgery was not necessary. For that reason the panel in *Riberio* agreed with the WCJ that the permanent disability caused by the unreasonable surgery was nonindustrial and apportionment of the permanent disability caused by the unauthorized surgery was supported. (*Id.*)

In addition to *Barela* and *Ribeiro*, another panel of the Appeals Board has addressed the question of the compensability of temporary disability resulting from unauthorized medical treatment. In *Bucio v. County of Merced* (March 23, 2015, ADJ9203286) [2015 Cal. Wrk. Comp. P.D. LEXIS 123] (*Buscio*), the panel concluded that an injured worker is entitled to temporary disability indemnity regardless of whether the temporary disability resulted from reasonable medical treatment provided by the defendant or by reasonable medical treatment self-procured by the applicant based upon the following analysis:

> A defendant is liable under [] section 4600 to provide reasonable medical treatment to cure or relieve the effects of an industrial injury. However, an injured worker is not obligated to utilize such medical treatment, and may select *any* attending and/or consulting physicians he or she chooses, 'the

sole condition being that such physician must be retained at the expense of the injured employee.' (Lab. Code, § 4605; *Credit Bureau of San Diego, Inc. v. Johnson* (1943) 61 Cal.App.2d Supp. 834 [8 Cal.Comp.Cases 289].) As the Court of Appeal wrote in *Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal.App.3d 486, 490 [41 Cal.Comp.Cases 415]:

[S]ection [4605] simply recognizes that any injured employee is free to seek medical treatment and/or consultation in addition to, or independent of, that for which his employer is responsible. In such case, the employee is personally responsible for that expense; and it is a matter which is not within the jurisdiction of the Board...

[T]he UR and IMR processes adopted by the Legislature to address medical treatment disputes [do not] have application to disputes concerning an injured worker's entitlement to temporary disability indemnity...

The UR process described in section 4610 is defined in subdivision (a) as applying to disputes involving 'medical treatment services *pursuant to Section 4600*,' which sets forth the defendant's duty to provide reasonable medical treatment. (Emphasis added.) Section 4610 makes *no* mention of medical treatment self-procured pursuant to section 4605 or a worker's entitlement to temporary disability indemnity. Instead, the effect of UR as described in section 4610.5(e) is only to assure that 'Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review...' ...

Similarly, section 4610.5 describes IMR as a means for addressing a section 4600 medical treatment dispute following a UR that denies authorization. However, as with the UR statutes, nothing in section 4610.5 addresses medical treatment self-procured pursuant to section 4605 or an injured worker's entitlement to temporary disability indemnity.

In fact, no statute distinguishes between temporary disability that results from section 4605 self-procured medical treatment and temporary disability that results from section 4600 medical treatment authorized and paid for by the defendant. Instead, an employee is entitled to temporary disability indemnity up to the statutory limits when he or she is temporarily unable to work during the period of medical recovery following an industrial injury. (See generally Lab. Code, §§ 4650-4657; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

The effect of the separate statutory provisions for addressing section 4600 medical treatment disputes and for providing temporary disability indemnity were considered by the Supreme Court in *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209] (*Valdez*).

In *Valdez*, the employee admittedly sustained an industrial injury and began treatment with a physician in her employer's Medical Provider Network [MPN]. However, she became dissatisfied with the MPN physician and instead of seeking a different physician in the MPN, she self-

procured a non-MPN treating physician. The applicant thereafter sought temporary disability indemnity at an expedited hearing based upon the reporting of her self-procured physician. The employer argued that the treating physician's reports were inadmissible on the question of applicant's entitlement to temporary disability indemnity because they were not prepared by an MPN physician and section 4616.6 provides that reports by a non-MPN physician are not 'admissible [*sic*] to resolve any controversy arising *out of this article* [2.3].' (Emphasis added.)

The Supreme Court described the question it faced as 'whether section 4616.6 applies only in proceedings to resolve diagnosis and treatment disputes under article 2.3 [which addresses MPNs], or more broadly in proceedings to determine disability benefits.' (*Valdez, supra,* 57 Cal.4th at 1235.) In concluding that section 4616.6 only applies in proceedings to resolve diagnosis and treatment disputes under article 2.3, the Court first noted that the Legislature established '[t]wo different statutory schemes for dispute resolution,' one for medical treatment issues and the other for claims involving disability indemnity. (*Ibid*, at p. 1234.) The Court then rejected the employer's contention that the statutes that address the resolution of MPN medical treatment disputes preclude consideration of reports by a self-procured physician when addressing issues of disability, writing as follows:

> The employer's attempts to transform section 4616.6 into a general rule of exclusion rest largely on its insistence that MPNs, when established, must be the exclusive source of diagnosis and treatment for injured employees. The Legislature has imposed no such requirement. Section 4605 has long permitted employees to consult privately retained doctors at their own expense, and the amendments enacted by Senate Bill 863 maintain that right. (*Ibid*, at p. 1240.)

In this case, as in *Valdez*, the employee self-procured medical treatment pursuant to section 4605 instead of obtaining further treatment from defendant pursuant to its section 4600 obligation. As in *Valdez*, the fact that applicant's medical treatment was self-procured is unrelated to the question of whether he is entitled to temporary disability indemnity. This is because an injured worker is *not* obligated to utilize medical treatment provided by the employer. Instead, as in *Valdez*, the issue of temporary disability indemnity is to be addressed on its own merit, and *not* by consideration of the statutory process for addressing disputes involving section 4600 medical treatment. As the Court wrote in *Valdez*, using the section 4600 medical treatment dispute statutes to address the separate issue of temporary disability 'would be inconsistent with the terms of section 4605' because it would undermine the employee's right under section 4605 to self-procure medical treatment for an industrial injury. (*Valdez, supra,* 57 Cal.4th at 1240.) (*Bucio, supra*, italics in original.)

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An employee is entitled to unapportioned compensation for permanent disability caused by reasonable medical treatment of the industrial injury. (See, *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] [2017 Cal. App. LEXIS 572].) In that the UR and IMR statutes are silent on the question of temporary disability indemnity, an employee is not precluded from claiming it even if the disability results from reasonable medical treatment that is self-procured pursuant to section 4605. It is recognized that this has the potential to expose an employer to liability for the consequences of medical treatment that does not meet the standards of reasonableness established by the Legislature for section 4600 medical treatment through the UR and IMR processes. (See, Lab. Code, § 5307.27 [providing for the establishment of "a medical treatment utilization schedule" that incorporates "evidence-based, peer-reviewed, nationally recognized standards of care..."] However, this is the law under the existing statutes.

UR and IMR assure that employees receive treatment that is "reasonably required to cure or relieve the injured employee of the effects of his or her injury." (Lab. Code, § 4610.5(c)(2).) This is done by applying uniform objective standards in a specified order.[4] (*Id.*) These uniform standards assure not only that the medical treatment provided by a defendant satisfies its obligations under section 4600, they also assure that any associated temporary disability is the result of reasonable medical treatment that was necessarily provided.

Applying the same reasonableness standards to section 4605 self-procured medical treatment as to treatment provided by an employer pursuant to section 4600 would assure that the employer's liability for temporary disability indemnity is the same in both instances. However, the uniform standards that apply by statute to section 4600 medical treatment are not statutorily applied to medical treatment that is self-procured pursuant to section 4605. As a result, self-procured medical treatment is not held to the same established standards as medical treatment provided by an employer pursuant to section 4600 and

[4] As set forth in section 4610.5(c)(2), the standards and the order they are to be applied are as follows: "(A) The guidelines adopted by the administrative director pursuant to Section 5307.27. (B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service. (C) Nationally recognized professional standards. (D) Expert opinion. (E) Generally accepted standards of medical practice. (F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious."

that is the law that is applied in this case. It is for the Legislature to determine if the standards that apply to section 4600 medical treatment should also apply to medical treatment self-procured pursuant to section 4605 for the purpose of determining entitlement to temporary and permanent disability indemnity.

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For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the July 12, 2017 Findings And Award of the workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

JOSÉ H. RAZO

I CONCUR,

FRANK M. BRASS

CHAIR

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 25 2017

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

BELINDA GO
SMITH & BALTAXE
LAW OFFICES OF TIMOTHY HUBER

JFS/abs