

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ10168011

BELINDA GO,

Applicant,

vs.

**SUTTER SOLANO MEDICAL CENTER;
SUTTER HEALTH SACRAMENTO;**

Defendants.

**REPORT & RECOMMENDATION
ON PETITION FOR
RECONSIDERATION**

Defendant filed a timely Petition for Reconsideration of the Findings & Award which was filed and served on 7/12/2017. Applicant has filed an answer.

This matter proceeded to trial on 5/15/2017 on the issues of temporary disability and permanent disability related to the self-procured cervical spine surgery which had been previously denied by Utilization Review and upheld by Independent Medical Review.

Please note that Marvin Zwerin D.O. was the PQME, not the AME as noted in applicant's answer.

The opinion on decision stated:

HISTORY OF THE CASE

Belinda Go, born 9/7/1969, while employed on 6/9/2013 as a registered nurse, occupational group 311, by Sutter Solano Medical Center, sustained injury arising out of and in the course of her employment to her neck. The employer is permissibly self-insured and self-administered.

She was in and out of work from the date of injury until she had neck surgery on 3/28/2016. She was paid broken periods of total temporary disability and wage loss.

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On 5/7/2015, Christopher Neuberger, M.D. submitted a RFA (Request for Authorization) for cervical spine surgery. (Exhibit H) The RFA was submitted to Utilization Review and procedure was non-certified. (Exhibits D, E &F) The applicant filed for IMR (Independent Medical Review). IMR upheld UR's non-certification on 7/22/15. (Exhibit G)

During this time, 5/5/15 to 11/20/15, Ms. Go was on temporary total disability. When she saw her primary treating physician, G. Jude Shadday D.O., on 9/11/2015, she was found to be permanent and stationary. (Exhibit C) Dr. Shadday referred her to Mark Cohen M.D. for a final permanent disability report. (Exhibit A) Dr. Cohen agreed with the permanent and stationary day. Dr. Cohen assigned a 5 WPI to the neck disability which rated to 7% after valid apportionment.

Ms. Go attempted a return to work as of 11/20/2015 and continued to work until 3/22/16 despite experiencing a flare up of her symptoms during this period. (Exhibit 1, page 3)

In the face of the UR denial and IMR affirming that denial, she self-procured her neck surgery with Dr. Neuberger which occurred on 3/28/2016. [It should be noted that defendant's was correct. The surgery was performed by Jason Huffman M.D.)] She was off work from 3/22/16 to 6/6/16.

After surgery, she was evaluated by PQME Marvin Zwerin D.O. on 8/1/2016. He found her to be permanent and stationary as 7/28/2016. He assigned a 17 WPI to her neck disability. This rates to 23% after valid apportionment.

INDEMNITY BENEFITS RELATED TO SELF-PROCURED SURGERY ARE REASONABLE

Defendant cites *Ribeiro v. WCAB, Gus Jr. Restaurant, Zenith* (2009) 80 Cal Comp Cases 1222 (Note: The cite in defendant's brief left off a "2") [Writ denied], which was designated an Appeals Board noteworthy decision. Although this decision relies on the AME report which found that the self-procured surgery was not medically reasonable or necessary, the decision cited another case, a panel decision, *Barela v. Leprino Foods, 2009 Cal. Wrk. Comp. P.D. Lexis 482*. In *Barela*, the Board upheld the judge's decision that because the AME found that the self-procured lumbar surgery relieved the applicant's symptoms, it was reasonable medical treatment. The surgery had been denied on an industrial basis by utilization review. Because the surgery was found to be reasonable by the AME, in retrospect, the increased permanent disability post-surgery and periods of temporary disability related to the surgery were also reasonable.

The Board opined in *Barela* 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.

With regard to permanent disability, section 4660 mandates use of the AMA Guides and the 2005 Schedule. (Almaraz v. Environmental Recovery Services (ADJ1078163, September [*11] 3, 2009) 74 Cal.Comp.Cases __ (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.

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 was self-procured. This is because Dr. Ansel expressly concluded in his November 12, 2007 report, [*12] 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.

Although Barela is only a panel decision, its "logic" was considered by WCAB in Ribeiro, a significant panel decision, wherein the Board upheld the WCJ decision based the decision on a retrospective opinion by the AME. This means, of course, retrospective medical-legal reports can be used to determine the reasonableness and necessity, or not, of self-procured medical treatment and award permanent disability and temporary disability if there is a finding it was reasonable and necessary in the face of denials by utilization review which have been affirmed by IMR.

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In the present case, when Dr. Cohen performed the permanent & stationary evaluation on 12/7/15 (Exhibit A), before the self-procured surgery, he noted her complaints as follows:

Her primary complaint is right neck and scapular pain with numbness and tingling down the left arm to the little, ring and middle fingers, but her right shoulder and arm hurt worse than the left. She was last seen by Dr. Shadday on 12/4/2015 and then referred to me for evaluation. Ms. Go denies any loss of activities of daily living. She does have frequent pain in her right neck and shoulder blade area.

She had her surgery on or about 3/28/2016. She was seen by PQME Marvin Zwerin D.O. on 8/1/2016 (Exhibit 1). He noted her subjective complaints as follows:

Ms. Go relates that she has pain in the neck but no more pain in the RUE (right upper extremity). The neck pain is described as being “aching and throbbing.” It is there daily, constantly. The neck pain radiates to the bilateral upper trapezius muscle area. There is “no” numbness or tingling and no “heaviness I was experiencing” in the RUE since her surgery. (p.3)

Medically, UR/IMR notwithstanding, the ultimate validity of the decision to operate at C5-6 is substantial by the outcome thereof, evidenced by both an immediate decrease in neck and arm pain and complete cessation of radicular pain in the right arm. (p.8)

Therefore, as Ms. Go had a positive outcome with her self-procured surgery, the permanent disability post-surgically is applicable with the appropriate apportionment.

In addition, temporary disability from the date of surgery until the permanent disability date found by Dr. Zwerin of 7/28/2016 is also reasonable. The claim for TTD is only through 6/6/2016 when, presumably, she returned to work. Therefore the award for TTD will be from 3/22/2016 through 6/5/2016.

TEMPORARY DISABILITY OVERPAYMENT IS DISALLOWED

Defendants are claiming a TTD overpayment from the P&S date found by Dr. Shadday on 9/11/2015 until 11/20/2015. The overpayment is disallowed based on the findings of PQME Zwerin. Dr. Zwerin stated in his reports (Exhibits 1 & 2) that “...it is my opinion the P&S date chosen by Dr. Shadday and Dr. Cohen was both incorrect and severely premature in the face of a recommendation for spinal surgery by Dr. Neuberger...” As we know, this surgery did not occur until 3/28/2016.

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I have reviewed both the Petition for Reconsideration and the Answer to the Petition for Reconsideration. When formulating the above opinion, I put a lot of time doing legal research and thought into my opinions and conclusions. The defendant's Petition for Reconsideration does not persuade me to change my opinion or add anything to my opinion. The issue is subject to legal interpretation. I have viewed it one way and defendants have viewed it another way. There seems to be very little in the way of case law which is on point, primarily the two cases I have cited in my opinion.

I would like to point out a somewhat misleading statement by defendants. On page 8, starting at line 23, of their petition, it is stated the "Dr. Zwerin's opinions...is [sic] obvious bias against Utilization Review, in this case, the alleged 'stupidity' of their decision." By putting "stupidity" in quotes, it is implied that Dr. Zwerin actually used that word. A word search of Exhibits 1 and 2 did not find any variant of the word "stupid." What Dr. Zwerin actually stated regarding the UR denial was: "...clearly that decision was while defensible legally, irrational medically." He, along with many other treating doctors, is entitled to his opinion and certainly does not rise to the level of bias. (Exhibit 1, page 8, under the Discussion heading)

RECOMMENDATION

It is respectfully recommended that defendants' Petition for Reconsideration be denied.

DATE: 8/15/2017



Joan Succa
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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Filed and served on all parties listed on the Official Address Record

ON: August 16, 2017

BY: Jennifer Chan