

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JULIAN MALDONADO,**

5 *Applicant,*

6 **vs.**

7 **BEVERLY HILTON HOTEL; ACE**
8 **AMERICAN INSURANCE, Administered by**
9 **SEDGWICK CLAIMS MANAGEMENT**
10 **SERVICES,**

11 *Defendants.*

Case No. ADJ5832330
(Los Angeles District Office)

OPINION AND ORDER
GRANTING PETITION FOR
REMOVAL AND DECISION
AFTER REMOVAL

12 By timely and verified Petition, defendant seeks removal of the October 5, 2017 Order issued by
13 a workers' compensation administrative law judge (WCJ) removing Debbie Lee, RN/CPDM, as Nurse
14 Case Manager in this matter.

15 Defendant contends that it will be significantly prejudiced and will suffer irreparable harm unless
16 the Order is rescinded, and argues that reconsideration will not provide an adequate remedy after the
17 issuance of a final decision. Specifically, defendant claims that the services provided by Debbie Lee
18 ensure the efficient and responsive handling of various aspects of applicant's medical treatment,
19 including timely attention to medical reports and requests for authorization of medical treatment.
20 Defendant points out that applicant has an admitted injury to several discreet body parts and receives
21 medical treatment from several different physicians that is not adequately coordinated through a single
22 primary treating physician. Debbie Lee, defendant argues, is instrumental in enabling defendant's claims
23 examiner to promptly and appropriately facilitate the provision of reasonable and necessary medical
24 treatment to address applicant's accepted industrial claim.

25 Applicant filed an Answer to the Petition urging us to affirm the Order, and the WCJ filed a
26 Report and Recommendation on Petition for Removal (Report) also recommending that we deny
27 defendant's Petition.

1 We have considered the allegations of the Petition, applicant's Answer, the WCJ's Report, and
2 the record in this matter. Based on our review of the record, and for the reasons set forth in the
3 discussion below, we will grant defendant's Petition for Removal and rescind the Order removing Debbie
4 Lee as defendant's designated Nurse Case Manager in this case.

5 I. RELEVANT FACTS

6 Applicant, born February 16, 1958, while employed by defendant on September 1, 2005 as a
7 banquet server sustained injury arising out of and occurring in the course of his employment to his
8 lumbar spine, left shoulder, bilateral wrists, psyche, and dental. (Pretrial Conference Statement [PTCS],
9 August 2, 2017, p. 2.) Applicant also claims to have sustained an industrial injury to his lower
10 extremities. (Amended Application for Adjudication of Claim, August 3, 2017.)

11 In 2015 defendant assigned Debbie Lee, a Registered Nurse and Nurse Case Manager to this case.
12 (Minutes of Hearing/Summary of Evidence [MOH/SOE] October 5, 2017, p. 3: 6-9.) Ms. Lee's assigned
13 duties include acting as a liaison between the parties and the treating doctors with the specific goal of
14 facilitating treatment that has been denied to applicant. (MOH/SOE, p. 3: 10-13.)

15 Applicant objected to Debbie Lee as defendant's designated Nurse Case Manager in this case.
16 (PTCS, August 2, 2017, p. 3.) The parties were unable to reach an amicable resolution of that dispute
17 and a trial was held on October 5, 2017. The Minutes of Hearing identify the specific dispute for
18 resolution as follows:

19 Whether Debbie Lee functions as a Nurse Case Manager in this case.

20 Whether or not the Applicant can preclude Debbie Lee, NCM, or her
21 replacement from performing the following functions: One, call the
22 Applicant's Treating Physicians' offices to verify medical appointment
23 dates and attendance at the appointments; two, request medical records
24 and RFAs; three, send UR approval/denial; four coordinate with the
Ancillary Providers' offices and forward UR approvals to indicate
treatment is authorized. (MOH/SOE, October 5, 2017; p. 2: 11-17.)

25 Debbie Lee testified at trial and the matter was submitted on the record. The WCJ apparently
26 announced his decision at the conclusion of the trial. (MOH/SOE, October 5, 2017, p. 2: 1-7.) Formal
27 Minutes of Hearing, Summary of Evidence, and Disposition, Decision and Order were then prepared by

1 the Court Reporter and served by mail on all parties of record on October 9, 2017. Defendant now seeks
2 removal of that Order.

3 **II. DISCUSSION**

4 At the outset, we will address applicant's claim that the instant Petition is untimely and should be
5 dismissed on that basis. The gist of applicant's argument is that because the WCJ issued the Order orally
6 at the conclusion of the October 5, 2017 trial, the 20-day time-period to file a Petition for Removal
7 expired on October 25, 2017. Defendant's Petition was filed on November 6, 2017, well-beyond that
8 time period. Defendant's Petition, however, was timely filed. Labor Code¹ section 5313 requires all
9 findings, orders, decisions and awards issued by a WCJ to be served upon all the parties to the
10 proceedings. Here, the Court Reporter prepared official Minutes of Hearing that include the summary of
11 the evidence presented and the WCJ's decision, which she then served by mail upon all of the parties on
12 October 9, 2017. (See Cal. Code Regs., tit. 8, § 10500 (d).) When a decision is served by the Appeals
13 Board by mail upon a party, the time within which to respond, is extended five calendar days from the
14 date of mailing if the physical address of the party is within California, and ten calendar days from the
15 date of mailing where the physical address of the party is outside of California but within the United
16 States of America. (Cal. Code Regs., tit. 8, § 10507(2).) Here, the physical address of defendant is in
17 Lexington, Kentucky. Therefore, the Petition defendant filed on November 6, 2017 is timely and not
18 subject to dismissal.

19 Applicant also contends that removal is inappropriate and argues that defendant should have filed
20 a petition for reconsideration instead. We disagree. It is well understood that a petition for
21 reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code,
22 §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive
23 right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180;
24 *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45
25 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)*

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27 ¹ All statutory references hereinafter are to the Labor Code unless otherwise indicated.

1 (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is
2 fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th
3 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Interlocutory procedural or evidentiary
4 decisions, entered in the midst of the workers' compensation proceedings, are not considered "final"
5 orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders,
6 which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not
7 'final' "); *Rymer, supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate
8 procedural orders or discovery orders"); *Kaiser Foundation Hospitals (Kramer), supra*, 82 Cal.App.3d at
9 p. 45 [43 Cal.Comp.Cases at p. 665] ("[t]he term ['final'] does not include intermediate procedural
10 orders").) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding
11 evidence, discovery, trial setting, venue, or similar issues.

12 Here, the underlying Order from which defendant seeks removal is an interlocutory order
13 regarding defendant's claims handling practices. The Order is not determinative of a threshold issue that
14 is fundamental to applicant's claim for workers' compensation benefits. Therefore, defendant properly
15 sought removal of the Order in question.

16 We turn now to the merits of the Petition. The questions that we must address are whether or not
17 the services of a Nurse Case Manager are reasonably required medical treatment in this case, and whether
18 Debbie Lee actually functions as a Nurse Case Manager. The fact that Debbie Lee uses the title, Nurse
19 Case Manager, is not, in and of itself, dispositive of that issue. In *Lamin v. City of Los Angeles Police*
20 *Department* (2004) 69 Cal.Comp.Cases 1002, an Appeals Board panel held that reasonably required
21 medical treatment may include the services of a Nurse Case Manager, but before a defendant can be
22 liable for such services, several prerequisites must be met. Foremost, the services of a Nurse Case
23 Manager must be reasonably required to cure or relieve the effects of the industrial injury. Next,
24 subdivision (b) of 4600 makes clear that medical treatment that is reasonably required to cure or relieve
25 the effects of an industrial injury is that treatment based upon the medical treatment utilization guidelines
26 (MTUS) adopted by the Administrative Director pursuant to section 5307.27. Therefore, it must be
27 established that the MTUS provisions germane to the particular industrial injury/injuries call for a Nurse

1 Case Manager as reasonable and necessary medical treatment. If the relevant MTUS provisions do, they
2 are accorded a presumption of correctness, which can only be controverted by a preponderance of
3 scientific medical evidence establishing that a variance from the MTUS is reasonably required to cure or
4 relieve the effects of the industrial injury. (Lab. Code, § 4604.5(a).) Although panel decisions are not
5 binding precedent on the Appeals Board or a WCJ², we find the *Lamin* reasoning sound and persuasive.

6 Applying the *Lamin* principles to the specific facts in the record before us, we are persuaded that
7 there is no evidence from which we can conclude that a Nurse Case Manager is reasonably required
8 medical treatment to which applicant is entitled, or that Debbie Lee provided medical treatment in the
9 form of nursing to applicant. There is no medical evidence from a treating doctor, a panel qualified
10 medical evaluator, or an agreed medical evaluator that applicant requires Nurse Case Management
11 services as reasonable medical treatment to cure or relieve the effects of his industrial injuries. Neither
12 party has pointed to an applicable provision within the MTUS that recommends a Nurse Case Manager
13 as reasonably necessary medical treatment. Moreover, the nature of the services Ms. Lee provides here
14 simply cannot be characterized as medical treatment. Her un rebutted testimony confirms that she
15 facilitates the administration of applicant's claim by verifying applicant's attendance at medical
16 appointments, by ensuring that applicant's treating doctors understand and comply with their reporting
17 requirements, by ensuring claims personnel are made aware of requests for authorization of medical
18 treatment and respond in a timely manner, and that utilization review approvals and denials are timely
19 communicated to applicant's treating physicians. (MOH/SOE, October 5, 2017, pp. 2: 13-17; p. 3: 21-
20 23.) None of these duties are nursing; rather, they are a form of claims handling. Defendant has chosen
21 to utilize Debbie Lee solely to assist it in its appropriate and timely administration of applicant's claim,
22 and it is entitled to do so.

23 On this record, defendant has demonstrated that it will be substantially prejudiced if Debbie Lee
24 is removed as its designated Nurse Case Manager because her continued services facilitate the ability of
25 the claims examiner to handle the medical aspects of applicant's claim in a timely and efficient manner.

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27 ² *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn.2 (54 Cal.Comp.Cases 145).

1 Accordingly, we will grant removal and as our decision after removal, we will reverse the Order and
2 issue a new decision finding that defendant may continue to utilize the services of Debbie Lee because
3 she does not function as a Nurse Case Manager in this case under the rationale set forth in *Lamin, supra*.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Removal of the October 5, 2017 Decision and
3 Order is **GRANTED**, and, as our **Decision After Removal**, said Decision and Order is **RESCINDED**,
4 and a new decision issues as follows:

5 **FINDINGS OF FACT**

- 6 1. Debbie Lee, RN, CDPM, does not function as a Nurse Case
7 Manager in this case.
- 8 2. Defendant may continue to use the services of Debbie Lee to assist
9 in the claims administration of this case.

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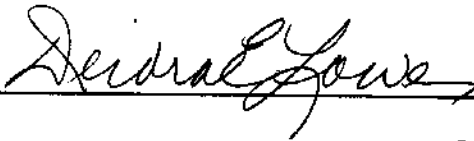
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1 **ORDER**

2 **IT IS HEREBY ORDERED** that applicant's request that Debbie Lee be
3 removed as defendant's designated Nurse Case Manager in this case is
4 **DENIED.**

5 **WORKERS' COMPENSATION APPEALS BOARD**

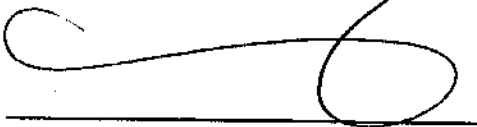
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8 DEIDRA E. LOWE

9 **I CONCUR,**

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11  **CHAIR**
12 **KATHERINE ZALEWSKI**



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16 **MARGUERITE SWEENEY**

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18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **DEC 07 2017**

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

22 **HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**
23 **JULIAN MALDONADO**
24 **LAW OFFICES OF DENNIS R. FUSI & ASSOCIATES**
25 **SEDGWICK CLAIMS MANAGEMENT SERVICES (2)**

26
27 **SVH/ara**

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

CASE NUMBER: ADJ5832330

JULIAN MALDONADO

vs

**BEVERLY HILTON HOTEL;
SEDGWICK WALNUT CREEK;
ACE AMERICAN INSURANCE,**

DATE(S) OF INJURY:

9/1/2005

**WORKERS' COMPENSATION
JUDGE:**

RICHARD SHAPIRO

DATE:

November 6, 2017

**REPORT AND RECOMMENDATION
ON PETITION FOR REMOVAL**

I.

BACKGROUND

By decision incorporated into Minutes of Hearing (MOH) dated 10/5/17, it was determined that Debbie Lee, nurse case manager, should be removed from this case based on objection of applicant. Defendant has filed a timely, verified petition for removal arguing that she should have been allowed to continue in that capacity because the services of a nurse case manager are required in this case.

II.

DISCUSSION

Defendant admits that Ms. Lee was a nurse case manager, and the stipulations entered into by the parties, as well as the testimony of Ms. Lee herself, show that Ms. Lee certainly fit the legal definition. Cf. Lamin v City of Los Angeles Police Department, (2004) 69 CCC 1002, 1009 (panel

decision). Defendant also concedes that applicant was unable to continue working with her. (Petition, p. 3). Ms. Lee herself testified that she was no longer communicating with applicant, and that a confrontation had occurred between her and the applicant in a doctor's office. Defendant argues that the remedy for this is for Ms. Lee to work "behind the scenes" so as to avoid all contact with him. (Ibid). The undersigned disagrees. The remedy is to appoint a nurse case manager with whom applicant can work.

Once a nurse case manager has been designated by defendant, applicant may object at any time to the designation, after which the parties are to attempt to agree on another nurse case manager and, if unable to do so, request the WCAB to appoint such a manager. Lamin v City of Los Angeles Police Department, supra. There is no case in which it has been held that applicant must demonstrate good cause in order to remove a carrier-selected manager. Indeed, it has been suggested that applicant himself may not have the right unilaterally to designate a manager. Pelletier v United Structures, Inc. 2013 Cal. Wrk. Comp. P.D. LEXIS 572. It is beyond dispute, therefore, that defendant has no unilateral right to designate a nurse case manager, which it is attempting to do in this case.

Defendant argues that a continuance should have been granted so that the adjuster, who did not appear on the day of trial, could testify on the issue. When asked for an offer of proof at trial, defense counsel was not able to specify any relevant testimony she could offer. That the adjuster found Ms. Lee competent and helpful would not be enough. Applicant did not want her to continue in that capacity, and had the right to challenge the choice. It is plain that applicant had lost confidence in her, and he was entitled to a change.

A replacement was not in fact appointed after the trial because neither side requested that the undersigned do so. The issue of a particular replacement was not listed in the handwritten stipulations and issues. Applicant attorney was ambivalent about whether one was required at all, and defense counsel argued only that he wanted Ms. Lee to remain in the position. Without any evidence on the

issue, including possible replacements, the issue was taken off calendar. So, too, was the issue of whether one was required at all, as there was no need to decide that issue apart from the question of whom the replacement should be if the issue were decided favorable to defendant. The parties were directed to seek agreement on the issue of a viable replacement, as well as whether there exists a continuing need for a nurse case manager, with the board retaining jurisdiction over both issues.

Finally, to prevail, defendant must show substantial prejudice or irreparable harm. Swedlow, Inc. v. WCAB (Smith) (1983) 48 CCC 476. Defendant has failed to make such a demonstration here. Much of the petition is taken up with the issue of whether a nurse case manager is required in this case, with defendant contending that one is essential. As noted above, that issue was taken off calendar. The sole issue decided was whether Ms. Lee should continue in the position. While Ms. Lee may be competent and congenial, there are surely other such nurse case managers in the Los Angeles area, and there is no obvious reason why the appointment of a replacement would cause any harm at all to defendant.

RECOMMENDATION

It is recommended that defendant's petition for removal be denied.

DATE: November 6, 2017

Richard Shapiro

Richard Shapiro
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE