WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROCHELLE STOCK,

Applicant,

vs.

CAMARILLO STATE HOSPITAL; STATE COMPENSATION INSURANCE FUND,

Defendants.

Case No. ADJ2426407 (VEN 0086297)
(Oxnard District Office)

OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION, GRANTING REMOVAL AND DECISION AFTER REMOVAL

Applicant, Rochelle Stock, has filed a petition seeking reconsideration of the Findings and Award, issued June 20, 2014, in which a workers' compensation administrative law judge (WCJ) found that defendant's Utilization Review (UR) determination was admissible over applicant's objection. Applicant had contended that the UR report was not admissible based upon her assertion that the employer may not contest through UR a request for authorization by a treating physician in the employer's Medical Provider Network (MPN). The WCJ's determination was made in response to applicant's request for expedited review of defendant's UR denial of authorization of a hospital bed, which was prescribed by her treating physician who is a member of the employer's MPN. The WCJ held that applicant requires further medical treatment, with "jurisdiction reserved pending review development of the medical record," and thus did not make a determination of the merits of the treating physician's request for authorization.

Applicant contests the WCJ's determination, asserting that defendant is required to authorize any medical treatment prescribed by an MPN physician and is not permitted to refer applicant's MPN physician's prescription of a hospital bed to treat her industrial injury to UR. Applicant further argues the WCJ erred in admitting the UR denial into the record.

Defendant has filed an answer to applicant's petition, and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of July 22, 2014, which considers, and responds to, each of the applicant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will dismiss applicant's petition for reconsideration, since the WCJ's determination is not a final order subject to reconsideration, but will treat applicant's petition as seeking removal to the Appeals Board, and as our decision after removal, we will affirm the WCJ's Findings and Award.

We concur with the WCJ that applicant's required participation in her employer's MPN does not prohibit defendant from referring an MPN physician's request for authorization of medical treatment to UR and Independent Medical Review.

Contrary to applicant's contentions, by its adoption of the MPN system, the Legislature did not evince an intent to preclude a defendant from seeking UR review of an MPN physician's request for authorization of medical treatment.[1] The law and the implementing administrative rules provide mechanisms for review of disputed treatment recommendations through UR, whether or not the treating physician is in the employer's MPN. Both the UR provisions and the MPN provisions of the Labor Code provide that a treating physician's request for authorization of medical treatment must be reviewed by a physician competent to evaluate the specific clinical issues, without distinction as to whether the physician is selected through the MPN. (Cf. Labor Code section 4610(e) and Labor Code section 4616(f).) Similarly, the definition of a primary treating physician in Administrative Director's Rule 9767.1 and Rule 9785(a)(1) both include a physician within an MPN.

Rule 9785(b)(3) provides that an injured worker's objection to a UR decision to modify, delay, or deny a treatment recommendation, "shall be resolved pursuant to Labor Code section 4610.5, if

[1] In fact, UR is mandatory for all requests for treatment. The court in *Sandhagen* held an employer that receives a request for treatment is required to undertake UR, and noted that an employer that reviews a request for treatment and determines it to be reasonably required "has *engaged in utilization review.*" (*State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981, at 991]. Emphasis in original.)

applicable, or otherwise pursuant to Labor Code section 4062." If a claims administrator disputes "a medical determination made by the primary treating physician, the dispute shall be resolved under the applicable procedures set forth in Labor Code sections 4610, 4061 and 4062."

When a defendant does not approve a treatment request from applicant's primary treating physician, the defendant must refer the request to a UR physician. Here, Dr. Moelleken's request that applicant be provided a hospital bed was clearly intended to provide applicant relief from the effects of her industrial injury under the terms of her award of further medical treatment. She has had a two level lumbar fusion, suffers from radiculopathy, Grade 2 spondylolisthesis with instability and foraminal stenosis at two levels above the fusion. Applicant cannot sleep on a flat bed and has been sleeping in a recliner. She has been trying to obtain a hospital bed for four years. In all of that time, she has not been able to enjoy a restful night sleep.

The UR denial of the request for a hospital bed was based upon "silence" in the MTUS guidelines, and the absence of "high quality studies" and "no exceptional factors ... in the documentation submitted to consider this request as an outlier to the guidelines. There is no other documentation to support the medical necessity of a hospital bed. As such, the medical necessity of the request has not been established and the request is non-certified."

We note that there is a hierarchy of standards to be applied to a review of the medical necessity of a request for approval of medical treatment, under Rule 9792.10.1(4)(A)-(F). If the MTUS is "silent," and there is no "peer-reviewed scientific and medical evidence," the reviewer may consider nationally recognized professional standards, expert opinion, generally accepted standards of medical practice and "treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious." It does not appear that the UR denial considered whether other standards may be applicable, as there was insufficient documentation or explanation provided to support the efficaciousness of Dr. Moelleken's request. Further review of this request will be by Independent Medical Review.

In any event, the issue presented to the WCJ for determination concerned the applicability of the UR process to Dr. Moelleken's request for authorization of a hospital bed. The WCJ correctly determined

that issue, and his decision is not a final order subject to reconsideration. Treating applicant's petition as seeking removal pursuant to the authority provided by Labor Code section 5310, we shall grant removal and affirm the WCJ's determination.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration, filed July 14, 2014, is **DISMISSED.**

IT IS FURTHER ORDERED that **REMOVAL** of this matter is, **GRANTED**, and as our Decision After Removal, the Findings and Award, issued June 20, 2014, is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

FRANK M. BRASS

RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 12 2014

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

ROCHELLE STOCK
GHITTERMAN, GHITTERMAN & FELD
STATE COMPENSATION INSURANCE FUND

SV/jp

STOCK, Rochelle

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

CASE NUMBER: ADJ2426407

ROCHELLE STOCK	**-vs.-**	**CAMARILLO STATE HOSPITAL,; STATE COMPENSATION INSURANCE FUND;**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **William M. Carero**

DATE: 07/22/2014

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION (OR REMOVAL)

I. INTRODUCTION

ROCHELLE STOCK while employed on 11-12-1990 in the State of California, by CAMEO COLLECTIONS, IMPERIAL LIEN SOLUTIONS C/O, CAMARILLO STATE HOSPITAL, whose workers' compensation insurance carrier was SCIF INSURED OXNARD, sustained injury arising out of and occurring in the course of employment.

II. CONTENTIONS

Petitioner contends that the utilization review denial of 05/13/2014 of Daniel Weinberg, M. D. / EK Health (Defendant's Exhibit B) is inadmissible because the treatment denied was recommended by a physician in defendant's Medical Provider Network.

III. FACTS

Alan Moelleken, M. D., a member of defendant's MPN, recommended that applicant be furnished with a hospital bed for her home. Applicant testified (Minutes of Hearing, 06/13/2014, page 3) that:

> She discussed a hospital bed with Dr. Moelleken. She discussed her inability to sit due to pressure on her spine. She's been sleeping in a recliner for four years. She cannot lay flat. She cannot sit or walk.
>
> There are several things that make her unable to use a regular bed. She is unable to lay flat; this causes tremendous problems. She sleeps two or three hours of interrupted sleep. The pain causes her to vomit and basically have a terrible life.
>
> If she was able to have a hospital bed and get some sleep, she would be better able to handle the pain and emotional consequences. She has been trying to get the bed for four years. This began, she said, in 1911 (apparently 2011).

Applicant went on to testify that she discussed these problems with the physician's assistant, who prepared notes for Dr. Moelleken and that she has been trying secure the bed for a year and a half.

The undersigned ruled that Exhibit B is admissible, and reserved jurisdiction over need for further medical treatment pending development of the medical record. The parties have not yet completed the Independent Medical Review process.

Petitioner seeks reconsideration.

IV. DISCUSSION

First, the decision herein is not a final order and not subject to reconsideration. Nevertheless, the instant petition is treated as a petition for removal and the substantive issue is herein addressed.

Applicant contends that Exhibit B is inadmissible and avers that the only legal mechanism to contest the recommendation of an MPN physician is found in 8 Cal. Code of Reg. Section 9767.7. This provides that when an injured worker "disagrees with the diagnosis or treatment of the third opinion physician, the injured employee may file with the Administrative Director a request for an Independent Medical Review." There is no provision for the employer or carrier to file an IMR request.

Defendant asserts that this regulation governs only the worker's procedure to contest an MPN treater's recommendation, and that the employer's procedure is UR.

Utilization review is the product of Labor Code Section 4610 (a), which reads: "For purposes of this section, 'utilization review' means utilization review or utilization management functions that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600."

The treatment described in the UR statute is defined by the cited code section, Section 4600, which reads: "(a) Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer. In the case of his or her neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

Importantly, subsection (b) reads: "As used in this division and *notwithstanding any other law*, medical treatment that is reasonably required to cure or relieve the injured worker from the

effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27" (emphasis added).

In turn, Section 5307.27* provides for implementing utilization review incorporating standards of care set forth in Labor Code Section 77.5, which required a "survey and evaluation of evidence-based, peer-reviewed, nationally recognized standards of care, *including existing medical treatment utilization standards, including independent medical review*, as used in other states, at the national level, and in other medical benefit system" (emphasis added).

In review, Section 4600 medical treatment is that which is "based upon the guidelines adopted by the administrative director pursuant to Section 5307.27" which in turn is that which is governed by "standards of care recommended by the commission pursuant to Section 77.5" including both UR and IMR. These standards are to be applied under section 4610 (a) to treatment recommendations by "physicians, as defined in Section 3209.3." Nothing in the Code or in the regulations makes any distinction between the "physicians" in an MPN and the "physicians" outside of any MPN. The Section 4600 treatment to be reviewed under Section 4610 is the treatment furnished in Division 4 of the Labor Code, "notwithstanding any other law." The regulations on MPNs do not supersede the code as to what treatment is governed by Sections 4600 and 4610.

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§ 5307.27. On or before December 1, 2004, the administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases.

Further, utilization review is mandatory for an employer in deciding whether to approve or deny injured employee's request for medical treatment. State Compensation Insurance Fund v. WCAB (Sandhagen) (2008) 73 CCC 981. Following UR, a dispute was previously referred to panel qualified medical evaluators, but is now to be determined by IMR.

Only determinations adverse to injured workers will go to IMR. If treatment is approved by UR the matter goes no further. If delayed, modified or denied, the injured worker now has the opportunity to seek IMR approval instead of a PQME referral.

The legislative goal* of replacing "determinations performed by qualified medical evaluators" with IMR demonstrates that it is the mandatory UR determination that IMR was designed to ratify or reverse. The worker's three chances at selecting an MPN treater do not constitute a way to leapfrog to IMR to resolve a medical care dispute, and deprive an employer from any opportunity to contest a course of care – even if patently ridiculous -- just because an MPN doctor recommended it.

An RFA, from an MPN doctor or not, may go to UR and then to trial on appeal ((Dubon v. World Restoration (2014) 79 CCC 566) or to IMR at the request of the worker.

Medical Provider Networks – created well before the 2012 expression of intent by the legislature – are not accepted from this dispute process.

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*The importance of Independent Medical Review was stressed with the finding of the Legislature in 2012 "That the performance of independent medical review is a service of such a special and unique nature that it must be contracted pursuant to paragraph (3) of subdivision (b) of Section 19130 of the Government Code, and that independent medical review is a new state function pursuant to paragraph (2) of subdivision (b) of Section 19130 of the Government Code that will be more expeditious, more economical, and more scientifically sound than the existing function of medical necessity determinations performed by qualified medical evaluators appointed pursuant to Section 139.2 of the Labor Code." (Note 1, section (f) of Labor Code Section 62.5)

V. RECOMMENDATION

Based on the foregoing, the undersigned WCALJ recommends that the petition for reconsideration be DISMISSED as not addressing a final order; or in the alternative DENED as a petition for removal for the reasons set forth herein.

DATED AT OXNARD, CALIFORNIA

DATE: 07/22/2014

WILLIAM M. CARERO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:
FINESTONE SCHUMAKER ET AL, US Mail
GHITTERMAN GHITTERMAN SANTA BARBARA, US Mail
ROCHELLE STOCK, US Mail
SCIF INSURED OXNARD, US Mail
SCIF STATE EMPLOYEES LEGAL GLENDALE, US Mail
Served on above parties by preferred method of service shown above at addresses shown on attached Proof of Service:
ON: 7/23/14
BY: Belinda Doleman
Belinda Doleman