WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELVIN SALGUERO, *Applicant,* **vs.** **CHARLES GEMEINER CABINETS; INSURANCE COMPANY OF THE WEST,** *Defendants.*	**Case No. ADJ6989761** **(Los Angeles District Office)** **ORDER DENYING PETITION FOR RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

We grant Applicant's request filed September 12, 2013 to file a supplemental petition and have considered the Supplemental Petition in reaching our decision herein.

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For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

DEIDRA E. LOWE

CONCURRING, BUT NOT SIGNING
ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 30 2013

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

MANUEL AGUIRRE
MCDERMOTT CLAWSON
ELVIN SALGADO

sye

CASE NO.: ADJ6989761

ELVIN SALGUERO	**vs.**	**CHARLES GEMEINER CABINENTS; INS. CO. OF THE WEST**

WORKERS' COMPENSATION JUDGE:	**DANIEL A. DOBRIN**
DATES OF INJURY:	**6/5/09**
DATE OF DECISION:	**8/9/13**
DATE OF PETITION:	**8/14/13**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant has filed a reconsideration petition from my decision following an expedited hearing on 7/29/13, at which time the claimant sought disputed modalities of medical treatment consisting of 1) referral for a hand surgery evaluation; 2) a series of upper extremity stellate block procedures; 3) round-the-clock home care provided by a psychiatric technician or licensed vocational nurse in response to the claimant's suicidal ideation and prior psychiatric hospitalization in February, 2013.

By order of 8/9/13, I granted applicant's request for a hand surgery referral and stellate block procedures but ruled against the claimant as to his request for "24/7" home care. The applicant took exception to the ruling on the home care issue and filed a timely, verified and properly served reconsideration petition on this basis.

On reconsideration, applicant contends, in essence, that the denial of the home care request was an abuse of the trial judge's discretion, particularly where no competent medical evidence was presented in rebuttal to the request articulated by Dr. Elena Konstat, PhD, a psychologist, and affirmed by Dr. Fred Hekmat, M.D., an orthopedist. More specifically, applicant contends that the home care request was supported by substantial evidence, that the

trial judge employed his own unqualified lay opinion to defeat a valid medical request, and engaged in speculative and invalid reasoning to deny the treatment request. Applicant also contends that since the literature shows that qualified psychiatric technicians have appropriate training and experience to administer medication and curb suicide risks, the trial judge should have provided for the use of such a technician to assist the applicant in the present case.

The petition was filed 8/14/13; I was on vacation from 8/15/13 until 8/26/13. Accordingly, the Board kindly granted me an extension until 9/4/13 to prepare this report.

II
FACTS

The applicant sustained an admitted injury herein, consisting of partial amputation of his left fourth and fifth fingers. (Other body parts were claimed to be injured as well, as noted below.)

The case previously went to hearing before the undersigned on multiple treatment and TD issues in December, 2009, following a protracted dispute over treatment control in which a neuroma removal surgery both sides agreed to be necessary was delayed for over a year because of a disagreement over whether the claimant was obligated to treat within the employer's MPN. Following this earlier hearing, I determined that the defendant had lost treatment control and that the claimant was entitled to treat with his free choice treater, Dr. Fred Hekmat.

The matter subsequently resolved via a combination of a $10,000.00 compromise and release as to disputed body parts (including sleep disorder and internal system) and a stipulated award to 53% regarding the left 4th and 5th finger and psyche, with provision for future care for these admitted body parts. I approved these settlements on 2/28/13, based

on earlier P&S reports from both sides that were provided me at the time. I do not recall anyone specifically advising me that at the time the settlement was approved, the claimant had only recently been released from a 12 day psychiatric hospitalization as noted below.

With regard to the disputed claim for home care, the documentary record at the trial herein showed that the applicant was psychiatrically hospitalized on 2/9/13 at Brotman Medical Center after verbalizing intent to kill himself by jumping off a freeway overpass. More specifically, the 2/7/13 report of his secondary psychiatric treater, Elena Konstat Ph.D., noted a significant suicide risk and significant depression in recommending a psychiatric hospitalization. (See generally Exh. 43.) The claimant was in fact hospitalized from 2/9/13 until 2/19/13. It is my understanding that defendant authorized this hospitalization based on Dr. Konstat's recommendation.

In a follow-up report dated 2/20/13 which was admitted as applicant's Exhibit 36, Dr. Konstat indicated that she visited the patient every evening of his hospitalization. She noted that the applicant also consulted with a Dr. Hulkower at the Brotman facility on a daily basis. In this report, the applicant described the hospitalization as beneficial—while he was very depressed at first, he began to participate in group therapy and interact with other patients. According to him, the hospitalization improved his self-esteem, appetite and sleep. He described himself as having a more positive outlook and denied any current suicidal or homicidal thoughts.

In this report, Dr. Konstat set forth a detailed treatment plan which included cognitive therapy; a pact with the patient "to avoid suicide and [receive] assistance in living up to that pact;" efforts to have the patient change maladaptive coping behavior, communicate negative thoughts and unmet needs more clearly; and "identify and prioritize the magnitude of

concern" about his physical pain issues and other concerns. Authorization was requested for individual therapy three times a week, stress management therapy once a week and psychopharmacological visits monthly. I would assume that appropriate authorization was extended as to these requests since they did not come up as an issue at the 7/29/13 hearing herein.

Despite the P&S award walked through by both counsel on 2/28/13, Dr. Konstat declared the applicant TTD in her 2/20/13 report. She also stated as follows:

"Currently, he must remain in a safe and controlled environment closely monitored for his well-being. Therefore, 24/7 home cares [sic] assistance, and transportation to all medical appointments is recommended. Mr. Salguero is taking potent medication, and should not drive himself as he maybe [sic] a danger to himself, or others. In addition, his medications should be provided by preferably an LVN, or Psychiatric Technician."

With regard to the supporting medical record for the disputed home care request, the only other report actually admitted in evidence which addressed the issue was Exhibit 35, the 5/6/13 report of the applicant's orthopedic PTP, Dr. Fred Hekmat, M.D. (A number of reports offered by the applicant were excluded from evidence, mainly because they were not obtained or served until after applicant's DOR requesting an expedited hearing and asserting that their discovery was complete—no objection has been made to these evidentiary rulings on appeal herein.)

In this report, Dr. Hekmat requested authorization for various orthopedic procedures which, by and large, was granted pursuant to the undisputed portion of my findings and order herein. He also stated the following with regard to home care:

"After review of the records of Dr. Konstat as well as the reports dated February 7, 2013, and February 20, 2013, it shows that the patient has a Discharge Psychological Report indicating that the patient returned to the office for an outpatient visit after being discharged from Brotman Medical Center. The patient was hospitalized on February 7, 2013, after disclosing his plan to end his life by throwing himself from a freeway bridge and to upcoming traffic. The patient was discharged from the hospital on February 19, 2013. While in the hospital, the patient was under the care of Dr. Jonathan Hulkower. Upon discharge from the hospital, he was advised to be taking medication.

"Dr. Konstat later indicated that, taking into consideration Mr. Salguero's delicate condition, authorization is hereby requested for individual therapy three times per week and stress management therapy twice per week. Mr. Salguero also requires psychopharmacological management every month for the next twelve months.

"She then indicates that the patient is temporarily totally disabled and requires 24/7 home care assistance, preferably by a psyche technician or LVN level. Transportation is also needed to all medical appointments. The patient is suffering from DSM-IV-309.81 Post-Traumatic Stress Disorder and DSM-IV-296.23 Major Depressive Disorder, Single Episode, Without Psychotic Features.

"Based upon these further records from Dr. Konstat, I feel that certainly the patient requires the following: ... [Par.] The patient requires 24/7 home care assistance by a psyche technician or LVN which is necessary to cure and relieve Mr. Salguero from the effects of his orthopaedic injury." (Exh. 35, pp. 3-4.)

No UR report or other competent medical evidence was prepared in response to any of the reports discussed above, at least with regard to the home care request.

As noted above, the matter went to expedited trial on the limited issues of applicant's request for authorization of a hand surgeon referral, stellate blocks and 24/7 home care. The trial was a contentious one, with a great deal of time taken up over evidentiary objections, disputes over service of documents, etc. requiring individual rulings as to almost every exhibit offered by the applicant. Defendant sought repeatedly and unsuccessfully to have the matter continued on a variety of grounds, including that a PQME evaluation with a non-MD psychologist was pending.

The applicant was the sole witness at the expedited trial. He was wearing an extraordinarily large bandage over his two fingers which were amputated in 2009. He confirmed that he had been hospitalized in February, which per him was due to his pain and his desire to kill himself by jumping onto a freeway. He complained of continued severe pain in his hand, arm, neck and head which made him feel like "blowing up his arm and . . . like killing himself every now and then." (Minutes, 7/29/13, p. 7, lines 16-17.) According to him, his "common law" wife and his sister were both taking care of him.

On cross-examination, he stated that he wanted to kill himself and had a specific plan to do this. Upon hearing this testimony, defense counsel pulled out her cell phone and announced that she was going to call 911 because the applicant's imminent suicide risk. I told defense counsel I would not allow the trial to be interrupted but would not try to restrict her right to make phone calls after the trial was done.

Upon further questioning, the applicant said he did not currently have a specific plan to kill himself. Much of the remainder of defendant's questioning had to do with threats he had allegedly made against defense counsel. The applicant denied making such threats but did say there was a period of time that he was angry and "didn't like anybody." (During trial,

defense counsel made a belated request for assistance with her personal security. Although applicant made no threats at trial and in my view was not acting in a threatening manner, the request was promptly referred to the Acting Presiding Judge and the resident CHP officer was brought into the courtroom for the balance of the trial. (See generally, *Id.* at pp. 8-9.)

Following trial, I issued a findings and order to the effect that the orthopedic modalities requested by Dr. Hekmat should be authorized, but that good cause had not been shown to authorize his request for 24/7 home care. The applicant's reconsideration petition as to the home care issue followed.

III
DISCUSSION

While the applicant's petition contains an impressive series of case quotes and case citations, few, in my view, are directly germane to the issue herein, namely: What quantum of proof is required to support a request for authorization of a given medical procedure where such request is not met with a timely UR denial?

The applicant of course, is entitled to reasonable and necessary care to cure or relieve his industrial injury. Per Labor Code section 4600(b), "notwithstanding any other provision of 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." The California Supreme Court has recently made clear that "[N]otwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of

the guidelines with a preponderance of scientific medical evidence. (§ 4604.5.)" (*Sandhagen v. WCAB*, 73 CCC 981, 990.)

The Board has applied this principle to deny authorization for a given modality of care even where the defendant has neglected to carry out timely UR review. In *Garcia v. Souplantation*, 2011 Cal.Wrk.Comp.P.D. LEXIS 116, a request for authorization of epidural injections which was never rebutted via UR review was nevertheless held insufficient to support a need for such procedures where the ACOEM guidelines disfavored such a procedure and the treater requesting authorization never explained any basis for deviating from these guidelines. In *Chairez v. Cherokee Bindery*, 2012 Cal.Wrk.Comp.P.D. LEXIS 506, an award of 24/7 home care was reversed, mainly because of an unclear record. However, the board panel instructed the trial judge on remand that "In addressing the issue of home health care as medical treatment, the WCJ should consider that even if it is determined that a utilization review is untimely or otherwise invalid, the applicant still has a burden of proving that the requested treatment conforms with the requirements of Labor Code section 4604.5 by showing that it is in accord with the appropriate guidelines, or by rebutting the presumption of reasonableness of treatment in accord with those guidelines, or by showing that a variance from those guidelines is reasonably required to cure and relieve applicant from the effects of his industrial injury. [*Sandhagen* cited.] In short, an untimely or improper utilization review does not automatically require issuance of an award of the requested treatment. Instead, it must also be shown by applicant that the requested treatment is within the applicable guidelines or is otherwise reasonable medical treatment."

There is no reference to any treatment guidelines or discussion of such guidelines in any of the reports submitted, nor do I find any support in any of the applicable guidelines for

Dr. Konstat's rather unusual request for 24/7 home care as a modality of care for severe depression. There is no mention of any such modality of care in Chapter 15 of the ACOEM guidelines regarding stress complaints.

As applicant seemingly acknowledges, the more applicable guidelines may be the chronic pain guidelines of AD rule 9792.24.2, which are posted online at http://www.dir.ca.gov/dwc/DWCPropRegs/MTUS_Regulations/MTUS_ChronicPainMedical TreatmentGuidelines.pdf, These guidelines state the following under the heading, "Home Health Services": "Recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time or 'intermittent' basis, generally up to no more than 35 hours per week. Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed. (CMS, 2004)"

Likewise, under the heading "Psychological Treatment," there is no recommendation in the Chronic Pain Guidelines for in-home presence of a psychiatric technician or other skilled nurse as an effective modality of care. In addition, no such recommendation can be found in the ODG guidelines cited in the "Psychological Treatment" section of the Chronic Pain Guidelines. See website: http://www.worklossdatainstitute.verioiponly.com/odgtwc/pain.htm#ODGCBTguidelines

Judging from Dr. Konstat's 2/20/13 report, the most helpful forms of care appear to be psychopharmacological management and cognitive therapy designed to encourage the patient to relate more with others and to implement useful coping mechanisms for his pain and other stressors. There is no indication that the proposed 24/7 nursing assistants would function as any more than unarmed guards designed to protect the patient from self-

destructive impulses or overmedication. As I stated in my opinion on decision, I fail to see how an institutional presence in the applicant's home could prevent him from harming himself if his underlying depression is not successfully treated. With regard to dispensing of medication, nothing in the reports presented indicate that this 53% disabled individual is at a peculiar risk of mis-dispensing his medication or has done so in the past.

My impression at the time of trial and at this time is that the more conventional modalities proposed by Dr. Konstat seem far more likely to be effective than in-home institutional supervision; if those modalities do not succeed, a rehospitalization would allow for implementation of meaningful acute care rather than simply monitoring an intractably depressed patient.

I find it notable that neither Dr. Hulkower, who I assume to be an MD psychiatrist, nor the current individual handling the applicant's psychopharmacological care has commented on the need for 24/7 care. The sole validation from an MD comes from orthopedist Dr. Hekmat who states little more than a bare conclusion that this is needed. (See *Williams v. Claire's Stores Inc., Travelers Ins Co.*, 2012 Cal. Wrk. Comp. P.D. LEXIS 497 [mere unsupported conclusion that home care is needed deemed insubstantial evidence of a need for such care.])

The main point that applicant seems to be making on reconsideration is that the judge inappropriately "played doctor" by applying his own "medical judgment" in rejecting unrebutted treatment recommendations, even though the judge had no medical training per se. I would agree that as a lay individual who is charged with evaluating and applying medical opinion evidence, it is certainly possible to cross the line from evaluating medical

evidence as a layperson and creating impermissible medical evidence or medical opinions of one's own. However, I do not believe that line has been crossed here.

In passing section 4600(b), the Legislature certainly expected that judges would make their own assessment of whether a given modality of care fell within published guidelines or adequately rebutted such guidelines. Obviously, this requires that judges make some assessment of the relative weight of the guidelines and any opinion to the contrary of such guidelines within the context of the facts of any specific case. I believe that that is all I have done herein. In so doing, I note that there is no support for the recommended modality of care in any of the guidelines referenced in AD rules 9792.20 et seq and no discussion of any such guidelines in the reports submitted in support of the authorization request. I further note that the request does not make a great deal of sense to me as being a reasonable and necessary form of treatment for a young man who is struggling with pain and depression but who otherwise appears to be able-bodied enough to carry out most normal activities of daily living.

Applicant seemingly urges as a "treatment guideline" a general description of what a psychiatric technician does. My impression from this description is that the bulk of such work is done in an institutional setting in concert with doctors, nurses and others. Be that as it may, the mere fact that psychiatric technicians are trained to handle disturbed and suicidal patients does in itself not make their constant presence in the applicant's home a reasonable and necessary form of care in my view.

Applicant cites the panel decision in *Zuniga v. SCIF*, ADJ3231606 in support of their claim for 24/7 care. I believe this is a bit disingenuous as there was no specific award of 24/7 care in that case, only a general finding of entitlement to psychological treatment with the

issue of hours and rates of home care deferred. In any event, such a decision was based on its own facts and is clearly not binding on the present matter. I also note that my ruling is without prejudice to any future request for specific assistance with activities of daily living that might currently be outside the applicant's capabilities or otherwise supported by the evidence, or other forms of care that find some support in existing guidelines or reasoned rebuttal thereto. However, for the reasons stated above, I do not believe that my denial of a thinly supported claim for 24/7 nursing care as a form of treatment of the applicant's depression was an abuse of discretion.

IV
RECOMMENDATION

It is respectfully recommended that the applicant's reconsideration petition be denied.

Respectfully submitted,

Daniel A. Dobrin

DANIEL A. DOBRIN
Workers' Compensation Judge

Served parties listed below by US Mail

On: 9/4/2013

By:

Jennifer Brown

Jennifer Brown

MANUEL AGUIRRE LOS ANGELES
MCDERMOTT CLAWSON ENCINO