WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DARLENE FERRONA, ***Applicant,*** **vs.** **WARNER BROTHERS, TIME WARNER ENTERTAINMENT CO; ZURICH LOS ANGELES,** ***Defendants.***	**Case No. ADJ2263476 (VNO 0318779)** **OPINION AND ORDER DENYING RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on January 21, 2015. The WCJ found that applicant sustained industrial injury to psyche and fibromyalgia from September 1994 to May 12, 1995; that requests for authorization (RFA)s for home health care were submitted on August 13, 2014 and August 22, 2014; that home health care services were certified by utilization review (UR) for the period from August 14, 2014 to August 14, 2015; that the opinions of A. Joseph Glaser, Ph.D., were substantial medical evidence and supported applicant's need for home health care services of 24 hours per day, 7 days per week; and that applicant is entitled to home health care services of 24 hours per day, 7 days per week. Defendant contended that the WCJ erred because UR only certified home health care services for four weeks during the year and not for the year and defendant provided the home health care services requested by the August 2014 RFAs; that the UR decisions of September 25, 2014 and September 29, 2014 in response to an RFA of September 23, 1014 were timely issued, the WCJ had no jurisdiction to review them pursuant to *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*) and applicant's remedy was to seek appeal of the subsequent independent medical review (IMR) determination under Labor Code[1] section 4610.6(h); that applicant did not comply

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

with the prescription requirement in section 4600(h) until August 2014, so that she was not entitled to home health care services before then and was required to obtain a new prescription after August 2014; and that *Patterson v. The Oaks Farm* (2014) (79 Cal.Comp.Cases 910) (Significant Panel Decision) (*Patterson*) did not apply because home health care services may only be provided pursuant to a prescription.

We received an Answer from applicant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ in response to defendant's petition for reconsideration, which recommended that the petition be denied.

We have reviewed the record and have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the WCJ's Report. Based on our review of the record, for the reasons discussed below, and for the reasons stated in the Report which we adopt and incorporate, we deny the Petition for Reconsideration.

We agree with the conclusions in the WCJ's Report. We write briefly to emphasize the following with respect to the prescription requirement in section 4600(h) and the application of *Patterson, supra*.[2]

BACKGROUND

In a report of May 6, 2009 in response to a petition for removal and/or reconsideration by defendant, the WCJ stated in pertinent part that the case had been resolved by stipulation with an Award issued on November 8, 2005 and that the stipulations provided for 100% permanent disability with "future medical treatment based on the AME in rheumatology, Dr. Bluestone, and the AME in psychiatry, Dr. Faguet." (Report, May 6, 2009, p. 1.) She further stated that "Dr. Bluestone had issued a supplemental report dated 3/30/07 stating that 'there probably is the need for home health care 24 hours a day.'" (*Ibid.*) On June 1, 2009, we adopted and incorporated the WCJ's report and denied the petition. Dr. Bluestone's May 6, 2009 report is not in the Adjudication file in EAMS, but it appears that applicant began receiving home health care services pursuant to the opinion of AME Dr. Bluestone that they were reasonable and necessary to cure or relieve from the effects of applicant's industrial injury.

[2] We do not address the issues of penalties and sanctions because we note that penalty petitions have been filed and those issues have been deferred.

On September 29, 2009, the parties appeared for a conference. The Minutes state that: "Defendant agrees to provide 24-hr home health care. Applicant agrees to cooperate with these efforts."

Thereafter, defendant provided home health care services of 24 hours per day, 7 days per week.

On August 1, 2014, Dr. Glaser examined applicant and issued a report. (Exhibit 2, A. Joseph Glaser, Ph.D., August 1, 2014.) In his report, he noted that he reviewed applicant's medical records. As relevant here, Dr. Glaser summarized applicant's records from her treating physician in rheumatology, David Silver, M.D., of January 25, 2011, August 9, 2011, and November 8, 2011, and noted that those records showed that applicant had been receiving 24 hour care and the plan was to "continue 24-hour care." (Exhibit 2, pp. 8, 9.) He concluded that:

> A review of medical records finds that Ms. Ferrona has described her history in a fashion consistent with that as previously reported. The records of Drs. Bluestone, Faguet and Lopata clearly indicate that this patient suffers from a chronic disorder which is not likely to improve for the foreseeable future. She requires ongoing psychological and medical support to relieve her from the effects of the industrial injury. It is medically probable on the basis of her history and current condition that her psychiatric injury will never actually be cured. . . . [¶] Based upon the current examination of Ms. Ferrona, it can be established meeting the parameters of reasonable medical probability that she continues to require psychological, psychiatric and homecare services, along with medical services as provided at the time she had last been examined by Dr. Bluestone. (Exhibit 2, p. 14.)

DISCUSSION

We first consider section 4600(h). On June 12, 2014, we issued *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) (*Neri Hernandez*). Defendant contends that section 4600(h) requires a new prescription for each period of requested home health care services before applicant is entitled to home health care services. Notably, the only authority cited by defendant for this proposition is *Neri Hernandez.*

In *Neri Hernandez,* we held that:

> When seeking home health care services, an injured worker must show that a prescription, as defined above, exists. This prescription requirement is a limit on the employer's duty to provide medical treatment. Separately, an injured worker must prove that the prescription was received by the employer and the date on which it was received. This receipt requirement narrows an employer's duty to pay for medical treatment because an employer's liability is limited to 14 days before the date that the

> prescription was received. Liability is not based on the date that the need for services may have begun. (*Id.* at pp. 692-693.)

Because the clock begins to run 14 days before receipt, the limit is akin to a statute of limitations or other filing deadline, and an injured worker must show the date of actual receipt in order to prove when the liability period began. Once an injured worker can demonstrate receipt of a prescription, he or she has met that burden for the purposes of section 4600(h). Satisfaction of this burden under section 4600(h) is separate from any consideration of whether an injured worker met the burden to prove that home health care services were reasonably required and whether an injured worker complied with the applicable rules and statutes for obtaining medical treatment. As explained in *Neri Hernandez*, the purpose of the prescription is to determine the date that an employer first became liable for home health care services, not to determine what is reasonable and necessary medical treatment. (*Ibid.*) We observe that a particular RFA may fit the definition of a "prescription" under section 4600(h) (see *Neri Hernandez* at p. 693) and that documentation of an employer's receipt of an RFA is part of the procedures for UR (see § 4610). Consequently, under appropriate circumstances, an injured worker may be able to use an RFA and its receipt to meet the burden under section 4600(h) to show that a prescription was received, thereby commencing the liability period. But, defendant's contention that section 4600(h) requires an injured worker to obtain renewed or updated prescriptions in order to continue ongoing home health care services is without merit.

In *Patterson, supra,* we held in pertinent part that:

> An employer may not unilaterally cease to provide approved nurse case manager services when there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury. . . .
>
> [And] It is not necessary for an injured worker to obtain a Request For Authorization to challenge the unilateral termination of the services of a nurse case manager. (79 Cal.Comp.Cases at p. 917.)

We concluded that:

> Unilaterally terminating medical treatment that was earlier authorized as reasonably required to cure or relieve the injured worker from the effects of the industrial injury is contrary to section 4600(a) unless supported by substantial medical evidence. (*Ibid.*)

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> Defendant acknowledged the reasonableness and necessity of nurse case manager service[s] when it first authorized them, and applicant does not have the burden of proving their ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the services is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization and starting the process over again. (*Id.* at p. 918.)
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> ***
>
> Applicant has no obligation to continually show that the use of a nurse case manager is reasonable medical treatment. Instead, once defendant authorized nurse case manager services as reasonable medical treatment, it became obligated to continue to provide those services until they are no longer reasonably required under section 4600 to cure or relieve the effects of the industrial injury. Like all medical treatment decisions, that determination must be based upon substantial medical evidence. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmens' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal. Comp. Cases 16].)
>
> Defendant failed to meet its burden of showing by substantial evidence that applicant's condition and circumstances changed in a way that made the further provision of nurse case manager services no longer reasonable medical treatment in this case. (*Id.* at p. 919.)

Here, *defendant agreed to provide home health care services and provided those services* through at least 2011 based on the recommendations of the AMEs. Thereafter, although the specific date is not clear from the record at trial, defendant unilaterally terminated those services. Then, Dr. Glaser evaluated applicant on August 1, 2014 and reviewed applicant's medical file. He concluded that applicant's medical treatment, including home health care services should continue as it had been provided at the time of AME Dr. Bluestone's last evaluation and that he did not foresee any change in applicant's condition.

Applying *Patterson* here, we conclude that defendant was not entitled to unilaterally terminate applicant's home health care services because there is no evidence of a change in applicant's circumstances or condition showing that those services are no longer reasonably required to cure or relieve from the effects of the industrial injury. And as explained above, applicant need not produce a new prescription in order for defendant to have liability for home health care services.

Accordingly, we deny the Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact and Order issued by a WCJ on January 21, 2015 is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY ANNE SCHMITZ

I CONCUR,

MARGUERITE SWEENEY

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 10 2015

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

DARLENE FERRONA
ROWEN, GURVEY & WIN, ATTN: ALAN GURVEY
STOCKWELL, HARRIS, WOOLVERTON & MUEHL, ATTN: JOEL ALLAN

ASljp