

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ERLINDA CANTILLO, *Applicant*

vs.

**AMAZON.COM, INC.; AMERICAN ZURICH INSURANCE COMPANY, administered
by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ12704660
Riverside District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order on Appeal of Administrative Director's IMR Determination (F&O) issued on March 22, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) defendant received applicant's RFA for home healthcare on November 1, 2021; (2) the UR determination dated November 6, 2021 denied the RFA for home healthcare at four hours per day for the next three months; (3) the administrative director's (AD's) IMR determination dated January 12, 2022 was based on the MTUS Initial Approaches to Treatment Guidelines; and (4) based upon findings 2 and 3, the IMR determination was not the result of a plainly erroneous finding of fact based upon ordinary knowledge and not expert opinion.

Applicant contends that the IMR determination incorrectly applied the MTUS's definition of "homebound."

We did not receive an Answer from defendant.

We have reviewed the Petition for Reconsideration. Based upon our review of the record, we will rescind the F&O and, as our Decision After Reconsideration, we will substitute a finding that the January 12, 2022 IMR determination applied the MTUS Initial Approaches to Treatment Guidelines in a plainly erroneous manner based upon ordinary knowledge and not expert opinion, and substitute an order that the dispute over the November 6, 2021 UR determination be remanded to the AD for submission to a different independent review organization or different reviewer as

provided in Labor Code section 4610.6(i),¹ and we will further order the parties to serve the Opinion and Order Granting Reconsideration and Decision After Reconsideration herein to the AD.

FACTUAL BACKGROUND

On March 7, 2022, the matter proceeded to trial of the following relevant issue: “IMR Decision dated 1/12/2022.” (Minutes of Hearing, March 7, 2022, p: 2:12.) The parties stipulated that Khalid Ahmed, M.D., is applicant’s primary treating physician. (*Id.*, p. 2:8.)

The WCJ admitted exhibits entitled Initial Approaches to Treatment Guidelines dated June 30, 2017, Medical Report of Dr. Ahmed dated June 14, 2021, and IMR Final Determination dated January 12, 2022, into evidence. (*Id.*, p. 2:15-24.)

The Initial Approaches to Treatment Guidelines dated June 30, 2017 states:

Home health care is a strategy used to address select patient problems on a short-term basis. This care is functionally based, cost-effective in select circumstances involving home-bound patients, and reduces the risk of (re)hospitalization. . . .

The authorization for home health care services should document the medical necessity for the care and include:

. . .

A home evaluation is necessary to develop the home health care treatment plan. . . . The evaluation assesses patient safety, equipment need, and care requirements to help prevent (re)hospitalization.

. . .

Home healthcare is selectively recommended on a short-term basis following hospitalization and major surgical procedures. It is also selectively recommended to prevent (re)hospitalization, to overcome deficits in activities of daily living (ADLs), and/or to provide nursing, therapy and/or supportive care services for those who would otherwise require inpatient care.

. . .

Indications: Due to the occupational injury or illness . . . the patient is unable to leave the home without major assistance (e.g. requiring wheelchair, walker, 3rd party transportation) . . .

(Ex. A, Initial Approach to Treatment Guidelines, June 30, 2017, pp. 14-15.)

Dr. Ahmed’s June 14, 2022 report states:

SUBJECTIVE COMPLAINTS

AME accepted body parts: Back and knee.

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

The patient complains of increased pain in the lumbar spine and left knee. She is MUA left knee on January 22, 2021 done by Dr. Katz. She is also status post left total knee replacement by Dr. Katz on August 21, 2020.

The patient stopped physical therapy, as she could not tolerate the therapy. She complains of continued pain in the lumbar spine and left knee. She uses a walker to assist with ambulation. The patient has a follow-up appointment coming up with the surgeon next week.

OBJECTIVE FINDINGS

...

The patient is using a walker to assist with ambulation.

...

DIAGNOSES

A. Secondary to work-related continuous trauma injury from August 31, 2018 to August 31, 2019, reason for evaluation:

1. Cervical spine strain/sprain with radiculitis/radiculopathy secondary to herniated cervical disc, reportedly positive MRI; status post epidural steroid injection x1.
2. Mid back strain/sprain.
3. Right shoulder strain/sprain.
4. Left shoulder strain/sprain with tendinitis, impingement rule out rotator cuff tear and internal derangement.
5. Right elbow strain/sprain.
6. Left elbow strain/sprain with medial/lateral epicondylitis, cubital tunnel syndrome.
7. Right wrist and hand strain/sprain rule out carpal tunnel syndrome.
8. Left wrist and hand strain/sprain, rule out carpal tunnel syndrome.
9. Right knee strain/sprain with internal derangement, reportedly positive MRI, pending surgery.
10. Status post left knee scope arthroscopic surgery, August 21, 2020, by Dr. Katz with post-op infection, treated by antibiotics x3 weeks at Kaiser, and status post left knee MUA, January 22, 2021 by Dr. Katz.
11. Right foot strain/strain with plantar fasciitis.
12. Left foot strain/strain with plantar fasciitis.

B. Secondary to work-related specific injury of September 2, 2019:

1. Cephalgia/contusion head with impaired memory, cognitive function.
2. Cervical spine strain/sprain with radiculitis/radiculopathy secondary to herniated cervical lumbar spine strain/sprain; status post instrumented fusion with adjacent segmental herniation proximal to fused segment. Right knee strain/sprain with internal derangement, reportedly positive MRI, pending surgery; status post epidural steroid injection x1.

3. Lumbar spine strain/sprain; status post instrumented fusion with adjacent segmental herniation proximal to fused segment.

4. Right knee strain/sprain with internal derangement, reportedly positive MRI, pending surgery.

5. Status post left knee scope arthroscopic surgery, August 21, 2020, by Dr. Katz with infection, post-op, treated by antibiotics x3 weeks at Kaiser.

C. Lumbar spine strain/sprain; status post instrumented fusion with adjacent segmental herniation proximal to fused segment.

...

DISCUSSION

...

I was asked to provide answers to the following . . .

Question #1. Discussion on activities of daily living:

Answer: The patient has severe difficulty with activities of daily living. She is using a walker to assist with ambulation. She cannot do dishes or household chores. She has difficulty with self-care and personal hygiene including bathing and going to the restroom. She has difficulty carrying groceries or pushing grocery carts. She has difficulty with kneeling, squatting, climbing, bending and stooping activities and difficulty climbing stairs. She has difficulty with grasping and lifting. She has difficulty driving the car. The patient cannot stand for prolonged periods of time and therefore, unable to cook or do dishes.

Question #2: Please provide opinion as to whether or not there are any other alternatives for treatment that may increase applicant's ability to perform any or all activities of daily living without assistance or supervision.

Answer: The patient is status post left knee arthroscopic surgery and status post left knee manipulation under anesthesia done January 22, 2021. She is status post lumbar spine surgery instrumented fusion with adjacent segmental disc herniation proximal to fused segment. The patient has a follow-up appointment coming up with the surgeon next week and further invasive procedures are deferred to orthopedic surgeon.

...

Question #9: Please confirm if you find that a client is homebound due to the current medical condition.

Answer: Yes

...

At this time, I continue to request for home health care to assist the patient with activities of daily living, 4 hours a day and 4 days a week for the next 3 months. The patient has difficulty performing the activities of daily living secondary to the industrial related injury. Some of the assistance the patient will need include the following: cooking, cleaning, showering/bathing, grocery shopping, traveling etc. (Ex. 1, Dr. Ahmed's June 14, 2021 Report, pp. 2-11.)

The IMR Final Determination dated January 12, 2022 states:

CLINICAL CASE SUMMARY

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Per the progress note dated 6-14-2021 the injured worker's work status is temporarily totally disabled. . . . Prior home health care was not clearly documented. . . .

Previous surgeries included lumbar spine fusion, left knee manipulation under anesthesia (1-22-2021) and left total knee replacement (8-21-2020).

In a telemedicine progress report dated 6-14-2021 the injured worker reported increased pain in the lumbar spine and left knee. The injured worker reported stopping physical therapy due to the inability to tolerate therapy. The injured worker reported utilizing a walker to assist with ambulation. A prior physical examination revealed decreased cervical and lumbar spine range of motion with positive straight leg raise testing. The examination revealed tenderness to palpation of the paraspinal musculature bilaterally. The physical examination of the left knee revealed positive tenderness and special testing with a joint effusion. The provider indicated the injured worker had "severe difficulty" with activities of daily living with inability to perform household chores, self-care and personal hygiene.

...

IMR DECISION(S) AND RATIONALE(S)

1. Home health care for 4 hours a day 4 days a week for the next 3 months for 52 visits is not medically necessary and appropriate.

UR Evidence Cited:

MTUS Initial Approaches to Treatment 2017 Guidelines.

IMR Evidence Cited:

MTUS Initial Approaches to Treatment 2017 Guidelines, Section(s): General Principles of Treatment.

...

In this case the injured worker has been diagnosed with cerebral concussion, neck and back pain, cognitive disorder, depression and anxiety, bilateral shoulder strain, bilateral elbow strain, and right knee sprain/strain. There is documentation of that the injured worker ambulates with assistive device and has difficulty with activities of daily living. In addition there is no documentation of home health evaluation. MTUS guidelines for home health care for 4 hours a day 4 days a week for the next 3 months for 52 visits have not been met. As such the request is not medically necessary.

(Ex. 4, IMR Final Determination, January 12, 2022, pp. 6-8.)

In the Report, the WCJ states:

Dr. Ahmed prepared a Request for Authorization (RFA), dated 6/14/2021, for home health care (Exhibit 2). It is unknown when the RFA was served. A Proof of Service was not provided. Applicant attorney contends it was served on 6/14/2021. Defendant contends that it was received on 11/1/2021.

...

On 11/8/2021, Sedgwick issued an UR Denial for home health care (Exhibit 3). Based on the CA MTUS /ACOEM Home Health Care Services 2017 Guidelines, home healthcare is selectively recommended on a short term basis following hospitalization and major surgical procedures. It is selectively recommended to prevent (re)hospitalization, to overcome deficits in activities in daily living, and/or to provide nursing, therapy and/or supportive care services for those would otherwise require in patient care. UR determined that there was insufficient evidence to recommend home health care.

An IMR Denial was issued on 1/12/2022 (Exhibit 4). . . . IMR relied upon the CA MTUS /ACOEM Home Health Care Services 2017 Guidelines (See Exhibit A) in issuing a denial to the request for home healthcare. (Report, p. 2.)

DISCUSSION

Section 4610.5 makes IMR applicable to "any dispute over a utilization review decision," and requires that any such dispute, "shall be resolved only" by IMR. The Medical Unit reviews UR plans and the IMR programs used to resolve disputes about medical treatment and medical-legal billing. The AD, although not a party to this action, is charged with oversight of Medical Unit programs that provide care to injured workers.

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the AD. The section explicitly provides that the AD's determination is presumed to be correct and can only be set aside by clear and convincing evidence of one or more of the following: (1) The AD acted without or in excess of the AD's powers; (2) The determination of the AD was procured by fraud; (3) The IMR reviewer was subject to a material conflict of interest that is in violation of section 139.5; (4) the determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability; or (5) the determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to section 4610.5 and not a matter that is subject to expert opinion. In upholding a challenge to the Constitutionality of section 4610.6, the Court of Appeal held that IMR determinations are subject to meaningful review, even if the Appeals Board cannot change medical necessity determinations, noting that "[t]he Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1100.)

Here, the IMR reviewer relied upon MTUS providing that “[h]ome healthcare is selectively recommended . . . to overcome deficits in activities of daily living . . . [and indicated when] the patient is unable to leave the home without . . . [a] walker.” (Report, p. 2; Ex. A, Initial Approach to Treatment Guidelines, June 30, 2017, pp. 14-15; Ex. 4, IMR Final Determination dated January 12, 2022, pp. 6-8.) In doing so, the reviewer explicitly recognized medical evidence that applicant has “‘severe difficulty’ with activities of daily living” and “ambulates with [an] assistive device” due to those difficulties. (Ex. 4, IMR Final Determination dated January 12, 2022, pp. 6-8.) Yet the reviewer concluded that home healthcare was “not medically necessary” without explaining how this evidence fell outside the MTUS or citing evidence that applicant was able to perform daily living activities without difficulty or ambulate without an assistive device or was not “homebound” as her primary treating physician had opined. (Ex. 4, IMR Final Determination dated January 12, 2022, pp. 8; Ex. 1, Dr. Ahmed’s June 14, 2021 Report, pp. 2-11.)

Hence, inasmuch as the MTUS recommend that home healthcare is to be provided to overcome deficits in daily living—and specifically indicated when the patient is unable to leave the home without major assistance requiring devices such as a walker—it is clear that the IMR determination applied the MTUS in a plainly erroneous manner based upon ordinary knowledge and not expert opinion.

In addition, the IMR reviewer relied upon MTUS providing that a “home evaluation is necessary to develop the home health care treatment plan” as a separate ground supporting the conclusion that home healthcare was not medically necessary. (Report, p. 2; Ex. A, Initial Approach to Treatment Guidelines, June 30, 2017, p. 15; Ex. 4, IMR Final Determination dated January 12, 2022, p. 8.) However, the MTUS do not state that a home evaluation must be performed in order for home healthcare to be recommended, but rather to ensure that such care is provided safely and correctly. (Ex. A, Initial Approach to Treatment Guidelines, June 30, 2017, p. 15.) It follows that the IMR reviewer’s conclusion that the lack of “documentation of home health evaluation” provided an additional ground to deny applicant’s home healthcare request was also based upon a plainly erroneous application of the MTUS.

Accordingly, we will rescind the F&O and substitute a finding that the January 12, 2022 IMR determination applied the MTUS Initial Approaches to Treatment Guidelines in a plainly erroneous manner based upon ordinary knowledge and not expert opinion.

In *Stevens, supra*, the court states:

IMR determinations *are* subject to meaningful further review even though the Board is unable to change medical-necessity determinations. The Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. (§ 4610.6, subd. (h)(1) & (5).) These grounds are considerable and include reviews of both factual and legal questions. [F]or example... the Board could set aside the determination as based on a plainly erroneous fact. Similarly, the denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually *is* permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and would thus be reviewable. (§ 4610.6, subd. (h).) We therefore disagree with Stevens that the IMR process provides 'no means to address conflicts about what constitutes medical treatment' and no 'meaningful appeal to challenge an IMR decision based on an erroneous interpretation of the law.'

(*Stevens, supra*, 241 Cal.App.4th at pp. 1100–1101, italics in original.)

Timely provision of reasonable medical treatment is an essential element of workers' compensation. (Cal. Const., Article XIV, § 4; *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93]; *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441]; *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566].)

Section 4610.6(i) provides in pertinent part as follows:

If the [IMR] determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization.

Based upon these authorities, we will remand the dispute concerning the November 6, 2021 UR determination to the AD for submission to a different independent review organization or different reviewer as provided in section 4610.6(i) and order the parties to serve the Opinion and Order Granting Reconsideration and Decision After Reconsideration herein to the AD.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute a finding that the January 12, 2022 IMR determination applied the MTUS in a plainly erroneous manner based upon ordinary knowledge and not expert opinion, and we will substitute an order that the dispute concerning the November 6, 2021 UR

determination be remanded to the AD for submission to a different independent review organization or different reviewer as provided in section 4610.6(i), and we will further order the parties to serve the Opinion and Order Granting Reconsideration and Decision After Reconsideration herein to the AD.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order on Appeal of Administrative Director's IMR Determination issued on March 22, 2022 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order on Appeal of Administrative Director's IMR Determination issued on March 22, 2022 is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Defendant received applicant's RFA for home healthcare on November 1, 2021.
2. The underlying UR determination dated November 6, 2021 denied the RFA for home healthcare at four hours per day for the next three months.
3. The administrative director's (AD's) IMR determination dated January 12, 2022 relied upon the MTUS Initial Approaches to Treatment Guidelines dated June 30, 2017.
4. The AD's IMR determination dated January 12, 2022 applied the MTUS Initial Approaches to Treatment Guidelines in a plainly erroneous manner based upon ordinary knowledge and not expert opinion.

ORDER

IT IS ORDERED that the dispute concerning the November 6, 2021 UR determination is **REMANDED** to the Administrative Director of the Department of Industrial Relations pursuant to Labor Code section 4610.6(i) for submission to independent medical review by a different independent review organization, or if a different independent medical review organization is not available after remand, the Administrative Director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization.

IT IS FURTHER ORDERED that the parties serve the Opinion and Order Granting Reconsideration and Decision After Reconsideration herein to the AD.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 13, 2022

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

**ERLINDA CANTILLO
GLAUBER, BERENSON, VEGO
ACUMEN LAW**

SRO/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*