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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCES STEVENS *Applicant,* v. OUTSPOKEN ENTERPRISES, INC.; STATE COMPENSATION INSURANCE FUND *Defendant(s).*	**Case No(s).** ADJ1526353 (SFO 0441691) State Compensation Insurance Fund's Petition for Reconsideration of the Opinion and Decision After Remittitur

State Compensation Insurance Fund is aggrieved by the Opinion and Decision After Remittitur and hereby petitions for reconsideration based upon the following grounds under Labor Code § 5903(a). That by the order, decision, or award made and filed by the appeals board, the appeals board acted without or in excess of its powers.

INTRODUCTION

In the Opinion and Decision After Remittitur dated May 29, 2017, the honorable WCAB panel acted without or in excess of its powers when it held: (1) the 2009 MTUS Guideline is unlawful and invalid because it is contrary to California law and the IMR determination that relied on it was therefore adopted without authority and (2) the WCJ may determine what evidence, if any, should be provided to the new IMR reviewer when submitted for review pursuant to §4610.6(i). State Fund respectfully contends the WCAB's findings are prohibited by the Labor Code and are beyond the scope of the Appellate Court's remand.

The Court of Appeal, First Appellate District, Division One remanded this case to the WCAB with specific instructions on how to conduct further proceedings. The Court stated it lacked a complete record of what was considered by the independent medical reviewer. Thus, the Court did not decide whether Ms. Stevens might have been entitled to relief on the basis that the IMR determination was adopted without authority or based on a plainly erroneous fact. (§ 4610.6, subd. (h).) The Court also defined how the WCAB could determine if the IMR determination was adopted without authority. The Court stated that whether home health services are authorized when bathing, dressing, and using the bathroom is the only care needed is a question to be resolved by reviewing and interpreting the MTUS. If the Board were to conclude that the IMR determination incorrectly affirmed the denial of these services by wrongly interpreting the MTUS, and it were to find there are no other reasons supporting the denial, it would have the power to conclude that the determination was adopted without authority. (§ 4610.6, subd. (h).) Thus, the WCAB was instructed to determine if IMR correctly interpreted the MTUS. Instead the WCAB panel has declared the MTUS unlawful and invalid. This finding exceeds the authority of the WCAB.

More importantly, the WCAB acted without authority when it found the WCJ may determine what evidence, if any, should be provided to the new IMR reviewer. The Code of Regulations mandates what must be submitted to IMR. It is not a question of fact for the WCAB to determine. The regulations requires the employer, in addition to other documents, to provide a copy of all reports of the physician relevant to the employee's current medical condition produced within six months prior to the date of the request for authorization, including those that are specifically identified in the request for authorization or in the utilization review determination. The WCJ determining what evidence, if any, should be provided to the IMR reviewer is beyond the WCAB's authority.

THE HONORABLE WCAB PANEL ACTED WITHOUT OR IN EXCESS OF ITS POWERS WHEN IT HELD THE 2009 MTUS GUIDELINE IS UNLAWFUL AND INVALID

The First District remanded this case to the WCAB after issuing an opinion in the this case. The Court in its decision defined the WCAB's role in response to Ms. Steven's contention there is no meaningful review of IMR decisions. The Court wrote:

> Stevens also argues that, regardless of the opportunities to be heard, section 4610.6 violates due process because it "limits and precludes any meaningful appeal of an IMR determination" and provides "no means to address conflicts about what constitutes medical treatment." (Boldface & some capitalization omitted.) Again, we disagree.

(*Stevens v. Workers' Compensation Appeals Board, Outspoken Enterprises et al.*, (2015) 241 Cal. App. 4th 1074, 1100.)

The Court then explained that the WCAB may review whether the IMR reviewer made a factual error or that the IMR reviewer did not correctly interpret the MTUS:

> [C]ontrary to Stevens's contention, 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. If, for example, an IMR determination were to deny certain medical treatment because the treatment was not suitable for a person weighing less than 140 pounds, but the information submitted for review showed the applicant weighed 180 pounds, 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. . . . But whether home health services are authorized when bathing, dressing, and using the bathroom is the only care needed is a question to be

> resolved by reviewing and interpreting the MTUS. If the Board were to conclude that the IMR determination incorrectly affirmed the denial of these services by wrongly interpreting the MTUS, and it were to find there are no other reasons supporting the denial, it would have the power to conclude that the determination was adopted without authority. (§ 4610.6, subd. (h).)

(*Id.* at pg. 1100, 1001.)

Thus, the WCAB was instructed to determine whether the IMR determination incorrectly affirmed the denial of these services by wrongly interpreting the MTUS. However, the WCAB panel's Opinion and Decision after Remittitur goes far beyond the scope of the Appellate Court's remand. The WCAB panel found the MTUS is unlawful and invalid:

> [W]e conclude that the Independent Medical Review (IMR) determination upholding denial of the request for a home health aide was "adopted without authority" by the Administrative Director of the Division of Workers' Compensation because the portion of the 2009 Medical Treatment Utilization Schedule (hereinafter "MTUS") Chronic Pain Medical Treatment Guideline (hereinafter "2009 Guideline") applied in this case provides that housekeeping and personal care services are not forms of medical treatment. This provision is contrary to long standing workers' compensation law, which recognizes that such types of non-medical care are forms of medical treatment that may be reasonably required to cure or relieve the effects of an industrial injury. (*Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 49 Cal.Comp.Cases 454;

1 [rejecting the blanket prohibition on "housekeeping" services
2 unrelated to nursing care, as reimbursable medical treatment under
3 section 4600 in *Keil v. State of California* (1981) 46
4 Cal.Comp.Cases 696 [Appeals Bd. en banc]; *Henson v. Workmen's*
5 Comp. Appeals Bd. (1972) 27 Cal.App.3d 452, 37 Cal.Comp.Cases
6 564; *Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155
7 Cal.App.4th 44, 54 72 Cal.Comp.Cases 1202, 1208.)
8 Therefore, we conclude that the 2009 Guideline is unlawful
9 and invalid since it fails to address the medical treatment in the form
10 of personal home care services sought by Ms. Stevens.
11 (Opinion and Decision after Remittitur dated May 19, 2017 at pages 1, 2.)
12
13 State Fund respectfully contends the WCAB lacks jurisdiction to declare portions
14 of the MTUS unlawful and invalid. The Labor Code requires that UR
15 determination be made consistent with the MTUS. As the *Steven*s Court noted:
16
17 Since the 2004 and 2013 reforms, a worker's physician now submits
18 a treatment recommendation that is reviewed under the employer's
19 UR process. (§ 4610.) A "medical director" designated by the
20 employer or insurer reviews all information "reasonably necessary"
21 to determine whether to approve, modify, or deny the
22 recommendation. (§ 4610, subd. (d).) The criteria used in making the
23 determination must be "[c]onsistent with the schedule for medical
24 treatment utilization." (§ 4610, subd. (f)(2).)
25 (*Stevens, supra,* 241 Cal. App. 4th at page 1090.)
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Thus, a UR decision is required by statute to be consistent with the MTUS. Furthermore, the Labor Code defines what constitutes "medically necessary" treatment for IMR. Labor Code § 4610.5(c)(2) provides:

> "Medically necessary" and "medical necessity" mean medical treatment that is reasonably required to cure or relieve the injured employee of the effects of his or her injury and based on the following standards, which shall be applied as set forth in the medical treatment utilization schedule, including the drug formulary, adopted by the administrative director pursuant to Section 5307.27:
>
> (A) The guidelines, including the drug formulary, adopted by the administrative director pursuant to Section 5307.27.
>
> (B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service.
>
> (C) Nationally recognized professional standards.
>
> (D) Expert opinion.
>
> (E) Generally accepted standards of medical practice.
>
> (F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious.

Labor Code § 4610.5 was enacted by Stats 2012 ch 363 § 45 (SB 863), effective January 1, 2013. Thus, after January 1, 2013 medically necessary treatment is defined as reasonably required to cure or relieve the injured employee of the effects of his or her injury and based on the MTUS and the other listed factors. Because medical necessity is defined by statute as including the MTUS, it is beyond the WCAB's authority to declare the MTUS unlawful and invalid. As the *Stevens* Court held, it is the WCAB's role to determine if IMR correctly interpreted the MTUS.

Moreover, the fact that the MTUS conflicts with the case law that predates Labor Code § 4610.5, does not make the MTUS unlawful and invalid. To the contrary, those cases are not binding precedent on what constitutes "medically necessary" for IMR because they address a statutory scheme which no longer exists. IMR and the definition of "medically necessary" were enacted by SB 863 effective January 1, 2013. The cases cited by the WCAB panel all predate January 1, 2013. The WCAB panel cites (*Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452; *Keil v. State of California* (1981) 46 Cal.Comp.Cases 696, *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, and *Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44, 54. Cases from 1972, 1981, 1984 and 2007 are not instructive to determine if IMR complied with the review standards for "medically necessary" found in Labor Code § 4610.5 since that statute was not enacted until 2013.

The WCAB is not powerless to overturn the IMR decision in this case. The WCAB could determine that the IMR reviewer should have considered other criteria beyond the MTUS. Under Labor Code § 4610.5(c)(2) those other criteria are: (1) peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service, (2) nationally recognized professional standards, (3) expert opinion, (4) generally accepted standards of medical practice and (5) treatments

that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious. In this case IMR relied upon the 2009 version of the MTUS page 51, which states:

> 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)

The 2009 version of the MTUS is based upon Medicare. The statement that, "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" is a statement that Medicare does not cover those services. However, the MTUS is not the only standard upon which IMR may rely. Remanding the case to the AD for a second IMR because the facts justify consideration of other criteria beyond the MTUS would be within the WCAB's authority. Declaring the MTUS unlawful and invalid is not.

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DETERMINING WHAT EVIDENCE, IF ANY, SHOULD BE PROVIDED TO THE IMR REVIEWER IS BEYOND THE WCAB'S AUTHORITY

The WCAB panel remanded this case to the trial judge with instructions that the WCJ may determine what evidence to provide to the new IMR reviewer. The WCAB panel wrote:

> In the event that the WCJ finds that the Administrative Director's determination is reversed, the WCJ may determine what evidence, if any, should be provided to the new IMR reviewer when submitted for review pursuant to §4610.6(i).

(Opinion and Decision after Remittitur dated May 19, 2017 at page 13.)

State Fund respectfully contends the WCAB panel acted without authority by finding the trial Judge may determine what evidence should be provided to the new IMR reviewer. The Labor Code and the Code of Regulations mandate what records must go to IMR. Labor Code § 4610.5(l) provides that the employer shall provide IMR:

> (1) A copy of all of the employee's medical records in the possession of the employer or under the control of the employer relevant to each of the following:
>
> (A) The employee's current medical condition.
>
> (B) The medical treatment being provided by the employer.

(C) The request for authorization and utilization review decision.

(2) A copy of all information provided to the employee by the employer concerning employer and provider decisions regarding the disputed treatment.

(3) A copy of any materials the employee or the employee's provider submitted to the employer in support of the employee's request for the disputed treatment.

(4) A copy of any other relevant documents or information used by the employer or its utilization review organization in determining whether the disputed treatment should have been provided, and any statements by the employer or its utilization review organization explaining the reasons for the decision to deny or modify the recommended treatment on the basis of medical necessity. The employer shall concurrently provide a copy of the documents required by this paragraph to the employee and the requesting physician, except that documents previously provided to the employee or physician need not be provided again if a list of those documents is provided.

8 CCR 9792.10.5 goes into more detail regarding the records the employer must send to IMR:

(a) (1) Within fifteen (15) days following the mailing of the notification from the independent review organization that the

disputed medical treatment has been assigned for independent medical review, or within twelve (12) days if the notification was sent electronically, or for expedited review within twenty-four (24) hours following receipt of the notification, the independent medical review organization shall receive from the claims administrator all of the following documents:

(A) A copy of all reports of the physician relevant to the employee's current medical condition produced within six months prior to the date of the request for authorization, including those that are specifically identified in the request for authorization or in the utilization review determination. If the requesting physician has treated the employee for less than six months prior to the date of the request for authorization, the claims administrator shall provide a copy of all reports relevant to the employee's current medical condition produced within the described six month period by any prior treating physician or referring physician.

(B) A copy of the written Application for Independent Medical Review, DWC Form IMR, that was included with the written determination, issued under section 9792.9.1(e)(5), which notified the employee that the disputed medical treatment was denied, delayed or modified. Neither the written determination nor the application's instructions should be included.

(C) Other than the written determination by the claims administrator issued under section 9792.9.1(e)(5) , a copy of all information,

> including correspondence, provided to the employee by the claims administrator concerning the utilization review decision regarding the disputed treatment.
>
> (D) A copy of any materials the employee or the employee's provider submitted to the claims administrator in support of the request for the disputed medical treatment.
>
> (E) A copy of any other relevant documents or information used by the claims administrator in determining whether the disputed treatment should have been provided, and any statements by the claims administrator explaining the reasons for the decision to deny, modify, or delay the recommended treatment on the basis of medical necessity.

Furthermore, subsection (a)(3) provides that any newly developed or discovered relevant medical records in the possession of the claims administrator after the documents identified in subdivision (a) are provided to the independent review organization shall be forwarded immediately to the independent review organization.

Thus, the regulation requires that IMR receive, among other document, a copy of all reports of the physician relevant to the employee's current medical condition produced within six months prior to the date of the request for authorization, including those that are specifically identified in the request for authorization or in the utilization review determination. It is therefore beyond the WCAB's authority to determine what evidence should be sent to the IMR reviewer since it is not a question of law or fact. As the *Stevens* Court noted, the WCAB

has considerable grounds to review IMR determinations including both factual and legal questions. However, what evidence shall be presented to IMR is not a factual or legal question for the WCAB. Labor Code § 4610.6, subd. (e) requires that the IMR determination identify the relevant medical records and set forth the relevant findings associated with the standards of medical necessity. Thus, it is up to IMR to identify what records are relevant. It is not a question of fact for the WCAB.

THE WCAB'S FINDING THAT THE MTUS IS UNLAWFUL AND INVALID IS A FINAL ORDER

Under Labor Code § 5900(a) any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award. In this case the WCAB's finding that the MTUS is unlawful and invalid is a final order. A final order includes any order that settles a threshold issue. It needn't resolve all issues or represent a final determination of benefits. *Maranian v. WCAB* (2000) 65 Cal Comp Cas 650, 655. A "threshold" issue has been described as "a substantial issue fundamental to the employee's entitlement to benefits, "an issue critical to the claim for benefits" and one "basic to the establishment of the employee's rights to benefits." (*Id.* at 651-655.)

In *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd (Painter)* (1980) 104 Cal.App.3d 528, the WCAB had made a determination that the employee's injury arose out of and in the course of his employment (hereinafter "AOE/COE"). The Appellate Court, in finding a determination of AOE/COE to be a final order, wrote:

Because of the self-executing character of California's workers' compensation statute, an employer confronted with an adverse determination by the Board on a threshold issue of the sort involved in this case may reasonably be said to be "affected" by the Board's order within the meaning of section 5950. Moreover, the order may reasonably be said to be "final" as that term is used in *Gumilla*, supra, 187 Cal. 638. *Gumilla's* holding that a mere grant of reconsideration is not reviewable is clearly distinguishable from the situation here. Finally, viewing the order in this case as "final" within the meaning of *Gumilla* would go far toward reconciling what would otherwise be a statutory anomaly. Section 5900, which governs the procedure for filing petitions for reconsideration, provides that such a petition may be filed by "[any] person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a referee . . . ." (Italics added.) In *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.*, supra, 82 Cal.App.3d 39, the court held that a referee's finding that an employer had failed to prove a statute of limitations defense, leaving the amount of a lien claim to be adjusted by the parties, was a "final" order within section 5900. "Such a final order, decision, or award, in the commonly accepted sense is one which determines any substantial right or liability of those involved in the case. The term does not include intermediate procedural orders which merely grant a petition for reconsideration, or a petition for reopening without affirmatively disposing of any of the issues involved." (1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d rev. ed. 1977) § 7.01[4].) . . . .We are persuaded by the legal and

> policy arguments in favor of permitting review in a case of this sort. Accordingly we determine that the matter is properly before us, and proceed to the merits. (*Id.* at 534, 535.)

Just as determination of AOE/COE is a threshold issue regarding an injured workers' right to collect benefits in *Painter*, finding the MTUS unlawful and invalid is a threshold issue. State Fund would have no liability if the WCAB were to find IMR properly interpreted the MTUS just as the defendant in *Painter* would have no liability if they prevailed on the issue of AOE/COE. Both determine a substantial right or liability of those involved in the case.

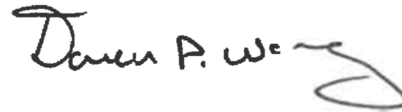
CONCLUSION

The WCAB has authority to determine if IMR has correctly applied the MTUS or to find that the facts justify consideration of other criteria beyond the MTUS. Those other criteria are: (1) peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service, (2) nationally recognized professional standards, (3) expert opinion, (4) generally accepted standards of medical practice and (5) treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious. It is not within the WCAB's authority to declare the MTUS unlawful and invalid. Moreover, the WCAB does not have authority to determine what evidence should be sent to the IMR reviewer. The Labor Code and Code of Regulations mandate what evidence is to be sent. And the Labor Code requires IMR to identify the relevant medical records. It is not a question of fact for the WCAB.

Dated: 06/12/17

Respectfully submitted,

STATE COMPENSATION
INSURANCE FUND



By: ______________________________
Darren Wong

1 VERIFICATION - CCP 446, 2015.5

2 I am the attorney for State Compensation Insurance Fund in the above-
3 entitled action or proceeding. I have read the foregoing and know the contents
4 thereof. I certify that the same is true of my own knowledge, except as to those
5 matters which are therein stated upon my information or belief, and as to those
6 matters I believe them to be true.

7 I declare under penalty of perjury under the laws of the State of California
8 that the foregoing is true and correct. Executed on June 12, 2017 at Sacramento,
9 California.

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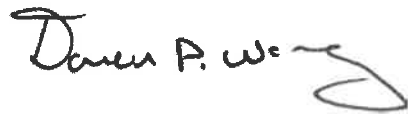
11 

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PROOF OF SERVICE BY MAIL - CCP 1013a, 2015.5

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is: 5880 Owens Drive, 3rd Floor, Pleasanton, California 94588-3900. On June 12, 2017, I served the attached **STATE FUND'S PETITION FOR RECONSIDERATION OF THE OPINION AND DECISISON AFTER REMITTITUR** on the interested parties in said cause, by placing a true copy thereof, enclosed in an envelope addressed as follows:

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REPUBLIC DOCUMENT MANAGEMENT
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice such envelope would be sealed and deposited with U.S. postal service on that same day with postage thereon fully prepaid at Pleasanton, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 12, 2017, at Pleasanton, California.

S MICHELLE REED
Michelle Reed

Frances Stevens
NA308109
ADJ1526353