

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 Case No. ADJ2086501 (SFO 0318776)

5 **KIM McCOOL (NELSON),**

6 *Applicant,*

7 *vs.*

8 **MONTEREY BAY MEDICAR;
9 ARROWOOD INDEMNITY COMPANY,**

10 *Defendants.*

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

11
12 Defendant seeks reconsideration of the August 19, 2014 Findings and Award (F&A) wherein the
13 workers' compensation administrative law judge (WCJ) awarded medical treatment in the form of
14 OxyContin, Norco and Lyrica.

15 Applicant sustained an injury to her low back while employed as an ambulance driver on
16 September 17, 1983. After undergoing three back surgeries from 1986 to 1991, her case was tried on
17 August 3, 1993. At trial, the parties stipulated to injury and that applicant was in need of further medical
18 treatment to cure or relieve the effects of the injury, and the matter was submitted solely on the issue of
19 permanent disability. A Findings & Award of 52% permanent disability was issued on September 29,
20 1993. The case remained inactive for the next 20 years.

21 On February 25, 2014, defendant's utilization review (UR) vendor denied a request from
22 applicant's current treating physician Mark Sontag, M.D. for the medications OxyContin, Norco, Amrix,
23 and Lyrica (Exh. 1). On July 30, 2014, applicant filed a request for expedited hearing on the issue of
24 entitlement to medical treatment. Defendant objected, noting that after the UR denial, defendant
25 subsequently approved the OxyContin, Norco and Lyrica.

26 The expedited hearing went forward on August 18, 2014. The parties and the WCJ
27 acknowledged that at the time of the hearing, and at the time applicant requested the hearing, defendant

1 had authorized and was providing the medications OxyContin, Norco, and Lyrica. Nevertheless, the
2 WCJ issued the F&A awarding the medications, and further ordered in her Opinion on Decision that
3 applicant shall continue receiving the medications until her circumstances change and the medications
4 are no longer reasonably required to cure or relieve from the effects of the industrial injury.

5 Defendant contends that the WCJ erred in awarding the medications and ordering their continual
6 provision, arguing that there was no dispute at the time of the expedited hearing; the WCJ misapplied
7 *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 (Appeals Board Significant Panel Decision)
8 to this case; and it was error to order the indefinite provision of opioid medications without being subject
9 to UR, Independent Medical Review, or state and Federal laws regulating the use of controlled
10 substances.

11 We have considered the Petition for Reconsideration. We have not received an answer from
12 applicant. The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report),
13 recommending that the Petition be denied. Based on our review of the record, we will grant
14 reconsideration and rescind the August 19, 2014 F&A.

15 First, we note that there was no current dispute to be resolved at the expedited hearing. Although
16 defendant had previously denied applicant's medications based on the February 25, 2014 UR
17 determination (Exh. 1), defendant later changed its mind and authorized the medications at least three
18 months before applicant requested the hearing. At the time of the hearing, the medications continued to
19 be authorized and provided; thus there was no controversy over which the Workers' Compensation
20 Appeals Board (WCAB) had jurisdiction pursuant to Labor Code sections 4604 and 5304.¹ According to
21 the WCJ's Report, applicant wished to proceed with the hearing because she was afraid that her
22 medications might be stopped in the future. However, the WCAB does not issue advisory opinions, nor
23 does it issue preemptive rulings regarding possible future controversies that may never occur.

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26 ¹ All further statutory references are to the Labor Code. Sec. 4604 provides that "controversies between employer and
27 employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as
otherwise provided by Section 4610.5." Sec. 5304 provides in pertinent part that "the appeals board has jurisdiction over any
controversy relating to or arising out of Sections 4600 to 4605 inclusive ..."

1 Next, we agree with defendant that the WCJ misapplied *Patterson* to the facts of this case. The
2 defendant in *Patterson* terminated agreed-upon, authorized, ongoing nurse case manager services for no
3 reason other than that Ms. Patterson was “difficult to deal with,” and offered no evidence at all that the
4 nurse case manager services were no longer reasonably required. The Appeals Board panel in *Patterson*
5 repeatedly noted that under those circumstances, defendant had the burden of showing that applicant’s
6 condition or circumstances had changed such that nurse case manager services were no longer reasonably
7 required pursuant to section 4600. In the instant case, unlike in *Patterson*, defendant did not unilaterally
8 terminate medications on its own initiative; rather, it submitted a prescription for medications to UR as
9 required by section 4610 and denied authorization based on the UR determination. Moreover, recurring
10 medication prescriptions are not the sort of ongoing care that was unilaterally terminated in *Patterson*.
11 Prescriptions by their very nature are limited in terms of frequency and time; the UR denial in this case
12 notes that each prescribed medication has a finite number of doses. Each new prescription requires a
13 new request for authorization that must be submitted to UR. Authorization of one prescription does not
14 automatically mean that recurring prescriptions of that medication must be authorized indefinitely; the
15 treating physician has an obligation to document the need for each recurring prescription, especially
16 when the prescriptions are for heavily regulated opioid medications. Although we agree with applicant
17 and the WCJ that the UR denial in this case was wrong as discussed below, the reasoning in *Patterson*
18 does not apply to the facts in this case. As a result, even if a dispute existed at the time of the expedited
19 hearing, the WCAB was without jurisdiction to resolve it absent a showing that the UR was untimely
20 (Lab. Code, § 4610.5; *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board
21 en banc) (*Dubon II*)), and the WCAB is also without jurisdiction to preclude UR of future treatment
22 requests.

23 Although we are rescinding the F&A for the reasons discussed above, we share the serious
24 concerns expressed by applicant and the WCJ regarding the UR denial of medications in this case. The
25 UR reviewer claimed to base his decision on the Medical Treatment Utilization Schedule (MTUS),² yet
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27 ² Cal. Code of Regs, tit. 8, §§ 9792.20 – 9792.26.

1 declared an abrupt halt to long-term opioid usage after quoting the MTUS language regarding the need
2 for weaning off such medication. The MTUS itself declares that "opioids cannot be abruptly
3 discontinued without probable risk of withdrawal symptoms," and notes that even where weaning off the
4 medication is appropriate (no such showing has been made in this case), "weaning should occur under
5 direct ongoing medical supervision as a slow taper."³ Defendant's uncritical acceptance of an internally
6 inconsistent UR recommendation not only caused applicant to seek an order preventing it from
7 happening again, but exposed applicant to serious health risks.

8 We emphasize that UR is intended as a way to ensure that injured workers receive timely and
9 medically necessary treatment pursuant to objective, evidence-based guidelines. It is not intended to be a
10 cost containment method. Section 4610, subdivision (c), requires that every UR process must be
11 governed by written policies and procedures ensuring that decisions regarding the medical necessity of
12 proposed medical treatment services are consistent with the MTUS. Defendant's policies and procedures
13 in this case were insufficient to prevent a decision in violation of section 4610(c). Fortunately for
14 applicant, defendant voluntarily changed its decision. However, any future decisions which violate
15 section 4610(c) may be referred to the Administrative Director to review defendant's written policies and
16 procedures and potentially assess penalties for abuse of the UR process.

17 For the foregoing reasons,

18 **IT IS ORDERED** that defendant's Petition for Reconsideration is **GRANTED**.

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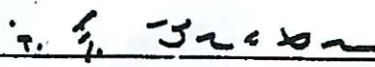
26
27 ³ MTUS, Chronic Pain Medical Treatment Guidelines (§ 9792.24.2).

1 IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers'
2 Compensation Appeals Board, that the August 19, 2014 Findings and Award is **RESCINDED** and this
3 matter is **RETURNED** to the trial level for further proceedings and a new decision by the WCJ if
4 requested by either party.

5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 
9 KATHERINE ZALEWSKI

10 I CONCUR,

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12 
13 FRANK M. BRASS

14 
15 RONNIE G. CAPLANE



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17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
18 NOV 07 2014

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

21 KIM McCOOL (NELSON)
22 DIETZ, GILMOR & CHAZEN
23 ARROWOOD INDEMNITY COMPANY

24
25 PD/ec
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