WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCES STEVENS, ***Applicant,*** **vs.** **OUTSPOKEN ENTERPRISES, INC.; STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ1526353 (SFO 0441691)** **OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL**

State Compensation Insurance Fund (defendant) seeks reconsideration of our Opinion and Decision After Remittitur issued on May 19, 2017. Our decision found 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 (MTUS) Chronic Pain Medical Treatment Guideline[1] (2009 Guideline) applied is not a medical necessity treatment standard but a Medicare coverage (payment) standard that is outside of the Administrative Director's authority under section 5307.27, and also contrary to Labor Code[2] section 4600(h) and long-standing case authority[3], making it void *ab initio*. The invalid 2009 Guideline was improperly applied to summarily deny the treatment request rather than evaluate it in accordance with section 4610.5(c)(2) and the MTUS. Because this conclusion is contrary to the WCJ's finding that the Administrative Director did not exceed her authority when she adopted the IMR determination, we rescinded the WCJ's Findings and Order denying

[1] 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 36 hours per week. Medical treatment does not include homemaker services like shopping, clearing, and laundry, and personal care given by home health aides like bathing, dressing and using the bathroom when there is the only care needed. (CMS, 2004.)

[2] All statutory references hereinafter are to the Labor Code unless otherwise indicated.

[3] *Keil v. State of California* (1981) 46 Cal.Comp.Cases 696 [Appeals Bd. en banc]; *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal. App. 3d 452, 37 Cal.Comp.Cases 564; I (2007) 155 Cal. App. 4th 44, 72 Cal.Comp.Cases 1202.

applicant's IMR appeal and returned this matter to the trial level for further proceedings in accordance with our decision.

Defendant contends that we lack authority to determine, as we did, that the 2009 Guideline applied in this case to deny the request for a home health aide is invalid and therefore void. Instead, defendant argues that our sole role is to determine whether IMR correctly interpreted the MTUS. Additionally, defendant claims that our remand order gives the WCJ authority beyond that authorized by the Labor Code and applicable regulations.

Applicant has filed an Answer to the Petition, and we have also received a joint Motion for Leave to File Amicus Curiae Brief and proposed Amicus Curiae Brief on Reconsideration by the California Workers' Compensation Institute (CWCI), California Chamber of Commerce (CalChamber), and California Coalition on Workers' Compensation (CCWC).

At the outset, we will deny the joint motion of CWCI, CalChamber, and CCWC to file an Amicus Curiae Brief in this matter. We are satisfied that defendant's Petition and applicant's Answer present the respective arguments in a thorough and complete manner, and the proposed Amicus Curiae Brief is unnecessary to insure that a just and reasoned decision issues.

We have considered the allegations of the Petition and the Answer filed by applicant. Based upon our review of the record and for the reasons set forth in the following discussion, we will dismiss defendant's Petition as a Petition for Reconsideration because it is not taken from a final order, decision or award. We will, however, treat it as a Petition for Removal and deny it with this clarifying opinion. We will not disturb our underlying decision.

DISCUSSION

A. The Opinion and Decision After Remittitur is Not a Final Order, Decision or Award

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers'*

Comp. Appeals Bd. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665], *Hikida v. Workers' Comp. Appeals Bd.* (2017) 2017 Cal. App. LEXIS 572) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "); *Rymer*, *supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals* (*Kramer*), *supra*, 82 Cal.App.3d at p. 45 [43 Cal.Comp.Cases at p. 665] ("[t]he term ['final'] does not include intermediate procedural orders").)

We reject defendant's characterization of our Opinion and Decision After Remittur as a final decision subject to reconsideration. Our conclusion that the then Administrative Director exceeded her authority when she adopted the IMR determination in this case is no more than a preliminary determination requiring remand, since the WCJ at the trial level reached a contrary conclusion. Thus, our decision does not result in a final order. (*Hikida,* supra, 2017 Cal. App. LEXIS 572.) Accordingly, we will dismiss defendant's Petition as a Petition for Reconsideration.

Treating defendant's Petition as a Petition for Removal, we will deny it because there has been no showing of substantial prejudice or irreparable harm for which reconsideration at a later date will not afford defendant an adequate remedy if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a)

/ / /

/ / /

/ / /

/ / /

/ / /

///

///

B. The Appeals Board has Exclusive Original Jurisdiction to Determine the Validity of a Regulation Adopted by the Administrative Director

We turn first to defendant's claim that the Appeals Board does not have the authority to determine that the 2009 Guideline is unlawful and invalid. Section 5300(f) vests the Appeals Board with exclusive original jurisdiction to determine the validity of regulations adopted by the Administrative Director. (Lab. Code, § 5300(f); *Mendoza v. Huntington Hospital Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 634, 640 [Appeals Bd. en banc]; *Boughner v. Comp. USA, Inc.* (2008) 73 Cal.Comp.Cases 854, 850 (Appeals Bd. en banc) writ den. sub. nom. *Boughner v. Workers' Comp. Appeals Bd.* (2009) 74 CalComp.Cases 770); see also Gov. Code, § 11351(c) [the Administrative Procedures Act provisions for Superior Court review of agency regulations "shall not apply to DWC"].) The MTUS consists of regulations, including the 2009 Guideline, adopted by the Administrative Director. (Cal. Code Reg., tit. 8, §§ 9792,20-9792.26); accordingly, the Appeals Board has exclusive original jurisdiction to determine the validity of the 2009 Guideline.

To be valid, an administrative regulation must be within the scope of authority conferred. Government Code, section 11342.1, to which the Administrative Director is subject, provides, in relevant part, "[e]ach regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." Further, Government Code section 11342.2 is unequivocal in its pronouncement that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." These directives leave no doubt that "[w]hen a statute confers upon a state agency the authority to adopt regulations . . ., the agency's regulations must be consistent, not in conflict with the statute." (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 679 [483 P. 2d 1231, 94 Cal. Rptr. 279].) An administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 419 [546 P. 2d 687, 128 Cal. Rptr. 183].) A regulation that is inconsistent with the statute it seeks to implement is invalid. (*Esberg v. Union Oil Co.* (2002) 28 Cal. 4th 262, 269 [47 P. 3d 1069, 121 Cal. Rptr. 2d 203].)

/ / /

Of course the regulations promulgated by an administrative agency are accorded a strong presumption of validity. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 11 [960 P. 2d 1031, 78 Cal. Rptr. 2d 1]; *Boughner, supra*, 74 Cal.Comp.Cases at p. 860.) If there is a reasonable basis for the regulation, a reviewing court will not substitute its judgment for that of the administrative agency. (*Boughner, supra*, 74 Cal.Comp.Cases at p. 860.) The reviewing court's inquiry, thus, must focus on two concerns: first, is the regulation within the scope of the statutory authority conferred and, second, is it reasonably necessary to effectuate the purpose of the statute. (*State Farm Mutual Automobile Ins. Co. v. Garamendi (2004)* 32 Cal. 4th 1029, 1040 [88 P. 3d 71, 12 Cal. Rptr. 3d 343].)

The relevant statutes in this case are sections 5307.27 and 4604.5. Subdivision (a) of section 5307.27 provides, in relevant part:

> The administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases.

The section directs the administrative director to adopt guidelines to determine the reasonableness and necessity of *medical treatment commonly provided in workers' compensation cases*. (Emphasis added) The guidelines must address the frequency, duration, intensity and appropriateness of the treatment in accordance with evidence-based standards of care. (Lab. Code, §§§ 5307.27(a), 4600(b), 4610.5(c)(2).)

Section 4604.5 confirms that the guidelines adopted pursuant to section 5307.27 are required to define the extent and scope of medical treatment, and must be grounded on evidence-based standards. In relevant part, it states:

> (a)The recommended guidelines set forth in the schedule adopted by the administrative director pursuant to Section 5307.27 shall be presumptively correct on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from

> the effect of his or her injury. The presumption created is one affecting the burden of proof.
>
> (b)The recommended guidelines set forth in the schedule adopted pursuant to subdivision (a) shall reflect practices that are evidence and scientifically based, nationally recognized and peer reviewed. The guidelines shall be designed to assist providers by offering an analytical framework for the evaluation and treatment of injured workers, and shall constitute care in accordance with Section 4600 for all injured workers diagnosed with industrial conditions.

Sections 5307.27 and 4604.5 leave no doubt that the Administrative Director's charge was to promulgate medical treatment guidelines founded on evidence and science, that describe the frequency, intensity, and duration of treatment procedures and modalities to be provided to industrially injured workers. When we examine the 2009 Guideline within the context of those statutory mandates, the inescapable conclusion is that it is in conflict. Foremost, the 2009 Guideline is not a treatment guideline at all. It does not discuss the intensity, frequency, and duration of homemaker or personal home care services, nor is it founded on science or evidence. Rather, it is a Medicare payment standard which includes the provision that medical treatment does not include homemaker services and personal care given by home health care aides. Defendant admits the same, and acknowledges that the 2009 Guideline "is based upon Medicare," and "is a statement that Medicare does not cover those services," making reference to homemaker services and personal care given by a home health aide. (Petition, p. 9: 14-18.)

Further, the 2009 Guideline contravenes subdivision (h) of section 4600, which codifies long-standing law[4]. That subdivision states: "Home health care services *shall be provided as medical treatment* only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 ... of the Business and Professions Code ... ." (Emphasis added) We acknowledge that the 2009 Guideline predates the

---

[4] *Smyers v. Workers' Comp. Appeals. Bd.* (1984) 157 Cal.App.3d 36 [49 Cal.Comp.Cases 454]; rejecting the blanket prohibition on "housekeeping" services unrelated to nursing care, as reimbursable medical treatment under section 4600 in *Keil v. State of California* (1981) 46 Cal.Comp.Cases 696 [En Banc]; *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452 [103 Cal. Rptr. 785]; *Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44, 54 [65 Cal. Rptr. 3d 687].

effective date of the legislative action that added subdivision (h) to section 4600[5]. Nonetheless, home health care is a long-standing modality of treatment and the 2009 Guideline should have defined the scope and extent of such services in accordance with evidence-based standards of care.[6]

The 2009 Guideline is outside of the Administrative Director's authority and, because it is not an evidence-based treatment guideline, it is unable to effectuate the purpose of section 5307.27. Accordingly, it is void *ab initio*.

C. The IMR Determination Improperly Applied the MTUS

Contrary to defendant's assertion, we did find that the IMR determination wrongly applied the MTUS when it affirmed denial of the home health care services requested by applicant's physician. As we stated in our Opinion and Decision After Remittitur[7], the IMR determination summarily applied the invalid 2009 Guideline to uphold denial of the request for a home health aide and stopped there. Because the 2009 Guideline is silent as to the appropriate intensity, frequency, and duration of home health care services, it was incumbent upon the IMR reviewer to evaluate the request by applying the treatment standards set forth in section 4610.5(c)(2)[8]and rules 9792.21 and 9792.21.1 (Cal.Code Regs., tit. 8, §§ 9792.21, 9792.21.1.) Section 4610.5(c)(2) provides the hierarchical framework for determining the

---

[5] Section 4600 was amended in 2012 to add subdivision (h). The amendment became effective January 1, 2013. (Stats. 2012, ch. 363, § 35 [SB 863].)

[6] We acknowledge that the 2009 Guideline has been revised since the court issued its decision. The revised guideline, effective July 28, 2016, provides that home health care and domestic and personal care services are forms of medical treatment to which an industrially injured worker may be entitled. The revised guideline provides the framework for determination of the scope and extent of such services, which are made on a case-by-case basis.

[7]Opinion and Decision After Remitittur, May 19, 2017, p. 2: 12-27; p. 3: 1-3.)

[8] (2) "Medically necessary" and "medical necessity" means 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.

medical necessity of treatment requests, beginning with the guidelines adopted by the Administrative Director. Other considerations within the hierarchy include (1) peer reviewed and scientific medical evidence regarding the effectiveness of the treatment, (2) nationally recognized professional standards, (3) expert opinion, (4) generally accepted standards of medical practice, and (5) treatments that are considered likely to provide a benefit for patients for conditions for which other treatments are not clinically effective. Here, the IMR looked no further than the invalid guideline, and did not evaluate the requested treatment in accordance with the other appropriate standards set forth in section 4610.5(c)(2).

Moreover, the MTUS clearly states that a treatment request cannot be denied on the sole basis that the condition or injury is not addressed in the schedule. (Cal.Code Regs., tit. 8, §9792.21(d).) In such event, the rules provide a specific paradigm to evaluate the request:

> (d) Treatment shall not be denied on the sole basis that the condition or injury is not addressed by the MTUS. There are two limited situations that may warrant treatment based on recommendations found outside of the MTUS.
> (1) First, if a medical condition or injury is not addressed by the MTUS, medical care shall be in accordance with other medical treatment guidelines or peer reviewed studies found by applying the Medical Evidence Search Sequence set forth in section 9702.21.1.
> (2) Second, if the MTUS' presumption of correctness is successfully challenged. The recommended guidelines set forth in the MTUS are presumptively correct on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of scientific medical evidence establishing that a variance from the schedule is reasonably required to cure or relieve the injured worker from the effects of his or her injury. Therefore, the treating physician who seeks treatment outside of the MTUS bears the burden of rebutting the MTUS' presumption of correctness by a preponderance of the scientific medical evidence.

Although the treatment request in this case was not denied because applicant's condition is not addressed in the MTUS, rule 9792.21 is relevant because it provides a logical framework within which to evaluate conditions and, by analogy, treatments that are not addressed in the schedule.

The IMR determination in this case could have and should have followed these protocols. Its failure to look beyond the 2009 Guideline statement that "[m]edical 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" was an improper application of the MTUS. The then Administrative Director ignored or failed to recognize that the 2009 Guideline is invalid and sanctioned its application anyway, in lieu of applying the required hierarchy. (Lab. Code, § 4610.5(c)(2); Cal.Code Regs., tit.8§ 9792.21.) Therefore, she exceeded her authority when she adopted the IMR determination.

D. The Order Remanding this Matter to the WCJ does not Exceed our Authority

We understand that defendant has interpreted our remand order as giving the WCJ authority beyond that set forth in statutes and regulations. That was not our intent, and we offer the following clarification. Of course the WCJ does not have unfettered discretion, nor can we convey additional authority beyond that set forth in the Labor Code and in the regulations.

As regards IMR, the Labor Code and the Administrative Director's regulations define the documentation that must be submitted to the reviewing entity, and the manner and time frames within which such documentation shall be submitted. (Lab. Code, § 4610.5(l); Cal. Code Regs., tit. 8,§ 9792.10.5.) Our Opinion and Decision After Remittitur does not allow the WCJ to dictate the information to be provided to IMR. It does acknowledge the challenges that the parties and WCJ may face in this matter given the passage of time since the IMR determination. Section 4610.5 and rule 9792.10.5 contemplate such circumstance. Both require that any newly developed or discovered relevant evidence also be submitted to insure that IMR has a complete and updated medical record.[9]

If, on remand, the WCJ determines that a new IMR is warranted, the statute and regulation discussed above will govern the evidentiary record to be submitted to IMR.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

[9] Labor Code section 4610.5 (m); California Code of Regulations, title 8, section 9729.10.5(a)(3).

For the foregoing reasons,

IT IS HEREBY ORDERED that defendant's Petition for Reconsideration of the Opinion and Decision After Remittitur issued on May 19, 2017, 2017 is **DISMISSED**, and as a Petition for Removal is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

KATHERINE ZALEWSKI

CONCURRING, BUT NOT SIGNING
RICHARD L. NEWMAN DEPUTY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 30 2017

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

FRANCES STEVENS
LAW OFFICES OF JOSEPH C. WAXMAN
STATE COMPENSATION INSURANCE FUND
ELLEN SIMS LANGILLE

SVH/*pc*