WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEFANO MUSETTI, ***Applicant,*** **vs.** **GOLDEN GATE DISPOSAL & RECYCLING dba RECOLOGY, permissibly self-insured, administered by CORVEL CORP.,** ***Defendants.***	**Case Nos. ADJ6948621** **ADJ7946738** **(Oakland District Office)** **OPINION AND ORDER DENYING RECONSIDERATION**

Defendant petitions for reconsideration of the January 31, 2013 Findings of Fact, Award, and Order, which was issued in both ADJ6948621 and ADJ796738.[1] In that decision, the workers' compensation administrative law judge (WCJ) found that applicant sustained industrial injury to his right knee on September 8, 2008 while employed as a garbage collector. The WCJ awarded applicant further medical treatment and ordered defendant "to authorize the total knee replacement that has been recommended by Dr. Forster, applicant's treating physician."

Defendant contends that the WCJ erred by ordering total knee replacement surgery while a supplemental report from the panel qualified medical evaluator (PQME) was still pending. Defendant further contends that Dr. Forster's report did not meet the requirements for a request for authorization and did not constitute substantial medical evidence.

We have considered the Petition for Reconsideration and applicant's Answer, and we have reviewed the record in this matter. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

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[1] It appears from the applications filed in each of these case numbers that both cases concern the September 8, 2008 specific injury. Upon return to the trial level, the WCJ should determine if these are duplicate cases and, if so, dismiss one of them.

For the reasons set forth below, we will deny defendant's Petition for Reconsideration of the January 31, 2013 Findings of Fact, Award, and Order.

SUMMARY OF FACTS

The parties stipulated that applicant Stefano Musetti sustained an industrial injury to his right knee on September 8, 2008. (January 31, 2013 Minutes of Hearing (MOH) p. 2.) The primary treating physician (PTP), Dr. R. Scott Forster, performed arthroscopic surgery on January 8, 2009. (Exh. 2, p. 8; see also Exh. 1; Exh. 5.) Dr. Jason J. Chiu was the PQME in orthopedics. (Exh. 2.) Dr. Chiu opined that applicant's knee condition was industrial but stated that applicant would likely require total knee replacement "to address his pre-existing condition," arthritic joint degeneration. (*Id.* at pp. 11-12.)

On September 20, 2012, Dr. Forster signed a Primary Treating Physician's Progress Report, using the PR-2 form, which stated that "TKA" (total knee arthroplasty) had been recommended and that applicant "would like to go ahead." (Exh. 6.) The boxes for "surgery or hospitalization" and "request for authorization" were not checked, but a surgery scheduling form was attached. (*Ibid.*) In a letter dated October 9, 2012 and addressed to applicant's counsel, Dr. Forster stated that he had recently examined applicant and determined that chondrolysis and synovitis "will precipitate [an] ever increasing amount of disability and that the only option for treatment is to perform a TKA." (Exh. 1.) Though he acknowledged the existence of nonindustrial osteoarthritis, Dr. Forster wrote that the industrial injury "did precipitate his ongoing impairment by causing an acute synovitis," and explained that further arthroscopic surgery was not appropriate because arthroscopy could either "improve things briefly or exacerbate a strong synovial reaction and cause him to have even more pain." (*Ibid.*)

The parties stipulated that applicant's counsel served Dr. Forster's letter on defendant on October 26, 2012. (MOH p. 2.) Defendant then sent a letter of its own, dated November 18, 2012, objecting to Dr. Forster's determination and requesting a medical evaluation from an agreed medical evaluator (AME) or the PQME. (Exh. C.)

The parties stipulated that defendant requested a supplemental report from Dr. Chiu on December 4, 2012. (MOH p. 2.) An expedited trial was held on January 31, 2012. Although not mentioned in the Minutes of Hearing, it appears that defendant objected to proceeding with trial on the

grounds that Dr. Chiu's report had not yet been completed. (Report, p. 2; see also Petition, p. 7.) The WCJ held the trial over defendant's objection and awarded the knee replacement. As she explained in her Opinion on Decision:

> "The only current medical report I have discussing Applicant's need for a total knee replacement is that of the report of Dr. Forster.... Defendant has been in receipt of this report and has delayed in forwarding the report to the panel QME, Dr. Chiu, to obtain a supplemental report regarding whether this total knee replacement would be appropriate. Since the only report I have in my possession that discusses Applicant's current need for medical treatment is that of Dr. Forster, I hereby find that it is appropriate to order Dr. Forster's recommendations."

ANALYSIS

Before treatment recommendations can be approved or denied, a physician must make a request for authorization of treatment through a Division of Workers' Compensation PR-2 form or a narrative report "containing the same information" as the form. (Cal. Code Regs., tit. 8, §§ 9785.2, 9792.6(o); see Lab. Code, §4610(a).) The form includes a box that the doctor can check if a request for authorization is included in the PR-2 report. (Cal. Code Regs., tit. 8, § 9785.2.) If the physician instead submits a narrative report, the document "shall be clearly marked at the top that it is a request for authorization." (Cal. Code Regs., tit. 8, § 9792.6(o); see *Cervantes v. El Aguila Food Products, Inc.* (2009) 74 Cal.Comp.Cases 1336, 1354 fn. 19 (Appeals Board en banc).)

As we explained in *Cervantes*, these rules "recognize[e] that claims adjusters routinely receive numerous medical reports from treating physicians," and thus need a way to promptly identify those reports that trigger deadlines for defendant. (*Cervantes, supra,* at pp. 1353-1354.) Dr. Forster did not check the appropriate boxes on the PR-2 form, and the narrative report contained in his October 9, 2012 letter lacked a heading stating that the letter was a request for authorization. Because of these regulatory violations, neither the PR-2 form nor service of Dr. Forster's letter triggered the time within which defendant had to conduct utilization review. By the time of defendant's November 18, 2012 letter, however, defendant had apparently examined Dr. Forster's request and realized that he was seeking authorization for surgery. (Exh. C.) After all, a surgery scheduling form was attached to the PR-2, and Dr. Forster's letter clearly indicated that he believed surgery was necessary. (Exh. 1; Exh. 6.) At that

point, defendant should have submitted the request to utilization review.

The employer or its insurer must perform utilization review when a physician requests authorization for treatment. (Lab. Code, § 4610.) "...[T]he Legislature intended for employers to use the utilization review process when reviewing *any and all* requests for medical treatment [emphasis in original]." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236 [73 Cal.Comp.Cases 981]; see *Elliot v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 359 [75 Cal.Comp.Cases 81].) Nothing in the record suggests that utilization review was ever performed.

When a defendant objects to the PTP's medical determination, it may not obtain a medical evaluation under Labor Code section 4062 in lieu of proceeding with utilization review. (*Sandhagen, supra*, at p. 244.) Defendant was not entitled to resolve the dispute by acquiring a supplemental report from Dr. Chiu, so the WCJ had no obligation to delay trial until that report was completed.

Furthermore, applicant met his burden of proving that the requested surgery was required to cure or relieve the effects of his industrial injury. (Lab. Code, §§ 4600(a), see *Sandhagen, supra,* at p. 242.) Dr. Forster's October 9, 2012 letter discussed the medical reasons why an additional arthroscopic surgery could not take the place of full knee replacement. (Exh. 1.) The letter also explained that the knee replacement was necessary to halt the "ever increasing" disability caused by applicant's industrial synovitis. (*Ibid.*) Medical treatment is not apportioned (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 405 [33 Cal.Comp.Cases 647), so defendant is liable for the surgery even if nonindustrial osteoarthritis was partially responsible for the knee condition.

"In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." (*E. L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687, 1691]; see *Escobedo v. Workers' Comp. Appeals Bd.* (2005) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc).) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which [the physician's] opinion was based and by the reasons given for his opinion." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 170 [36 Cal.Comp.Cases 93, 97].) Even though Dr. Forster did not specifically

discuss his disagreement with Dr. Chiu, Dr. Forster nonetheless explained the medical basis for his opinion. The WCJ properly determined that Dr. Forster's letter provided substantial medical evidence that knee replacement was reasonably required to treat applicant's industrial injury.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the January 31, 2013 Findings of Fact, Award, and Order is **DENIED** and the matter **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

ALFONSO J. MORESI

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 22 2013

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

FROST LAW FIRM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
STEFANO MUSETTI

CNF/bgr

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Stefano Musetti, Applicant

vs.

Golden Gate Disposal and Recycling Company, dba Recology, permissibly self-insured, administered by Corvel Corporation Defendant

LILLA J. RADOS

WORKER'S COMPENSATION ADMINISTRATIVE LAW JUDGE

ADJ7946738 AND adj6948621

REPORT AND RECOMMENDATION

ON PETITION FOR RECONSIDERATION

Defendant filed a timely petition for reconsideration from my Findings, Award and Order of 1/21/2013, ordering that defendant authorize the total knee replacement surgery requested by the treating physician, Dr. Forster.

ISSUE PRESENTED

1. Was it proper to proceed to a determination after an Expedited trial without a report from the panel QME?

INTRODUCTION

Applicant's treating doctor, Dr. Forster, issued a report on October 9, 2012, requesting authorization to proceed with a total knee replacement. On November 18, 2012, defendant objected to the requested treatment and indicated a desire to proceed to a panel QME evaluation. On December 4, 2012, defendant requested a supplemental report from the panel QME, Dr. Chiu.

An expedited trial was scheduled on the issue of applicant's entitlement to the total knee replacement on December 12, 2012. At the Expedited trial defendant indicated that they were awaiting a supplemental report from the panel QME. Defendant requested a 30 day continuance which request was granted.

On January 25, 2013 the parties appeared at the continued Expedited trial. Defendant was not yet in possession of a supplemental report from the panel QME. Because of the unavailability of a court reporter the matter was continued to January 31, 2013.

On January 31, 2013 the matter proceeded to trial over defendant's objection. Defendant was not yet in possession of a supplemental report from the panel QME.

Since the only current medical report in existence at the time of the expedited trial was that of the treating doctor, Dr. Forster, I issued an order for provision of the requested treatment, the total knee replacement.

It is from my order, ordering authorization for a total knee replacement that defendant is seeking this petition for reconsideration.

DISCUSSION

Defendant's right to due process was not violated. Defendant was in receipt of the treating doctor's request for authorization of a total knee replacement in October of 2012. Defendant had two months to obtain a supplemental report from the panel QME regarding applicant's potential need for a total knee replacement before the very first Expedited trial was even scheduled. Defendant was provided with a 44 day continuance to obtain the supplemental report from the panel QME. Defendant was than granted another 7 day continuance since no reporter was available to report the trial. In total defendant had 114 days from the initial request for total knee replacement to obtain a supplemental report from the panel QME. Due process does not require that infinite amount of time be allowed to obtain a supplemental report. Due process requires that a reasonable amount of time be provided to a party to develop their case. 114 days is more than reasonable amount of time to allow the defendant to obtain a supplemental report from the panel QME.

Although the treating doctor did not in bold, capitalized letters indicate on his October 9, 2012 request for authorization for a total knee replacement that the report was a request for treatment, it is evident from defendant's objection to the treating doctor's request for treatment, dated November 18, 2012 that they were fully aware of the requested treatment and they objected to it.

I am not sure why defendant does not send the treating doctor's request for total knee replacement surgery to utilization review. By November defendant is aware of the fact that there is a request for a particular treatment method. Although the report is non-compliant from the perspective of not indicating in big bold letters that it is a request for

treatment, once the carrier realizes that they are dealing with a treatment request, they are obligated to send that request to utilization review.

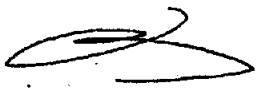
Defendant fails to conduct utilization review on a treatment requests and waits two months after receipt of request for treatment to request a supplemental report on the issue of need for total knee replacement.

Defendant is now asking to be provided with even more time so that a re-evaluation can be done on the applicant to determine the need for the total knee replacement.

Defendant had ample time to develop the medical record in this case. The treating doctor's report is substantial medical evidence on the issue of need for total knee replacement. It was appropriate to order the carrier to authorize the total knee replacement surgery.

RECOMMENDATION

I recommend that the petition for reconsideration filed by defendant be denied.



LILLA J. RADOS
Workers' Compensation
Administrative Law Judge

Filed and served by mail
On all parties on the
Official Address Record.
1. FROST LAW FREMONT
2. HANNA BROPHY

By: Ben Aguilar BA Date: 03/14/2013