80 Cal. Comp. Cases 740

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Court of Appeal, Second Appellate District, Division Two

May 29, 2015 Writ of Review Dismissed

Civil No. B263282

Reporter
80 Cal. Comp. Cases 740 * | 2015 Cal. Wrk. Comp. LEXIS 76 **

Deluxe Laboratories, ESIS, Inc., Petitioners v. Workers' Compensation Appeals Board, **Michael Samaras**, Respondents

Prior History:
[**1]

W.C.A.B. No. ADJ7387937—WCJ Craig A. Glass (OXN); WCAB Panel: Commissioner Zalewski, Chairwoman Caplane, Commissioner Lowe [see Samaras v. Deluxe Laboratories, 2015 Cal. Wrk. Comp. P.D. LEXIS 114 (Appeals Board noteworthy panel decision)]

Disposition: Petition for writ of review dismissed (no reasonable basis for petition)

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Medical Treatment—Utilization Review—WCAB reversed WCJ's finding that applicant who suffered industrial neck and back injury and claimed injury to multiple other body parts improperly selected Lawrence Miller, M.D., as his primary treating physician, and held that, contrary to WCJ's finding, applicant was not barred by holding in *Tenet/Centinela Hospital Medical Center v. W.C.A.B.(Rushing)* (2000) 80 Cal. App. 4th 1041 [95 Cal. Rptr. 2d 858, 65 Cal. Comp. Cases 477], from selecting Dr. Miller as new treating physician because applicant's original primary treating physician, Brian Grossman, M.D., did not discharge applicant from care in that, although he declared applicant "discharged from active care," he anticipated [*741] that applicant would require further medical treatment and imposed work restrictions, and WCAB found that, as properly designated primary treating physician, Dr. Miller's requests for authorization submitted to defendant were subject to utilization reviews, which did not occur, that, since nonexistent utilization review is untimely per se and invalid under *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion) (*Dubon II*), WCJ had jurisdiction to award requested treatment if it was supported by substantial medical evidence, that WCJ did not determine whether medical treatment requested by Dr. Miller was supported by substantial evidence and should be awarded, because he had concluded that physician was not properly designated by applicant, and that further proceedings were required regarding Dr. Miller's requests for authorization.

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 5.07[7], 22.03, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.09[3], 4.10.]

CALIFORNIA COMPENSATION CASES SUMMARY

Applicant suffered industrial injury to his neck and back in an automobile accident on 11/25/2008 and claimed injury to other body parts, during his employment as a driver by Defendant Deluxe Laboratories. Brian Grossman, M.D., was Applicant's treating physician following his injury. Dr. Grossman declared Applicant P&S, but Applicant disputed Dr. Grossman's findings and requested a PQME evaluation pursuant to Labor Code §§ 4061 and 4062. Applicant was subsequently evaluated by PQME

Robert Cohenour, M.D., a neurologist, who issued a report indicating that Applicant was P&S and recommending ongoing conservative medical treatment. Neither Dr. Grossman nor Dr. Cohenour diagnosed Applicant with a chronic pain syndrome or recommended evaluation by a pain management specialist.

Applicant filed an Application for Adjudication of claim and selected pain management specialist Lawrence Miller, M.D., as his primary treating physician. Dr. Miller diagnosed Applicant with a chronic pain syndrome—a diagnosis disputed by Defendant—and submitted RFAs for psychotherapy and a pain management psychologist. Defendant objected to Applicant's designation of Dr. Miller as his primary treating physician on the basis that Applicant had been discharged from care by Dr. Grossman and was required to comply with Labor Code §§ 4061 and 4062. Defendant also disputed Dr. Miller's finding that Applicant had a chronic pain syndrome and refused to authorize a PQME in pain management per Dr. Miller's request.

The matter proceeded to trial on various issues, including whether Dr. Miller was properly designated as Applicant's new primary treating physician, whether an additional QME panel in neuropsychology/pain management should be ordered, and whether Defendant was liable for costs or sanctions for delaying medical treatment. Following trial, the WCJ concluded that Applicant failed to comply with the statutory provisions for selecting/changing his treating physician to Dr. Miller, that, since Dr. Miller was not Applicant's treating physician, Defendant was not obligated to act on his requests for treatment authorization, and that **[*742]** Applicant was entitled to a QME panel in clinical neuropsychology. The WCJ directed the parties to bear their own costs and declined to award sanctions against either party.

Applicant filed a Petition for Reconsideration, contending in relevant part that the WCJ should have considered the reporting of his treating physician Dr. Miller and determined that the physician's RFA to obtain a psychotherapy evaluation and a pain psychologist was supported by substantial evidence. Applicant further contended that the WCJ erroneously declined to award sanctions, costs, and fees against Defendant.

The WCJ recommended that reconsideration (or removal) be denied, explaining in his report that he concluded Applicant improperly selected Dr. Miller as his primary treating physician because Applicant did not comply with the procedures in Labor Code §§ 4061 and 4062 as he was required to do pursuant to *Tenet/Centinela Hospital Medical Center v. W.C.A.B.* (*Rushing*) (2000) 80 Cal. App. 4th 1041, 95 Cal. Rptr. 858, 65 Cal. Comp. Cases 457. In *Rushing*, the Court of Appeal held that, when an injured worker's primary physician declares the injury to be P&S, releases the employee to return to work with no restrictions, and prescribes no further doctor-involved treatment or visits, the worker must follow the AME/QME process in Labor Code §§ 4061 and 4062 and 8 Cal. Code Reg. § 9785(b) in order to obtain a new primary treating physician. According to the WCJ, the holding in *Rushing* applied in this case because Applicant was discharged from care by Dr. Grossman. The WCJ also wrote that "[a]fter following the QME process, the applicant cannot subsequently seek a second primary treating physician in an effort to override both the original PTP and the Panel QME's [*sic*] without any prior action."

The WCAB granted reconsideration, noting that, while Dr. Grossman did write in his report that Applicant had been "discharged from active care," he anticipated that Applicant would require future medical treatment, as indicated by his statement in the same report that "[a]ppropriate future medical care would include oral anti-inflammatory or non-narcotic analgesic medications." Furthermore, the WCAB pointed out, Dr. Grossman did not release Applicant to return to work without restrictions, as occurred with the employee in *Rushing*. To the contrary, Dr. Grossman expressly opined that Applicant could not return to his usual occupation. Though the WCAB disagreed with the WCJ's conclusion that Applicant did not properly designate Dr. Miller as his primary treating physician, the WCAB nonetheless affirmed the WCJ's findings on the basis that Defendant did not conduct timely UR of Dr. Miller's RFA for a psychotherapy evaluation and a pain psychologist:

In that applicant's designation of a new primary treating physician was not precluded by the holding of the Court in *Rushing*, we turn to the evidence presented by applicant regarding his selection of Dr. Miller as his primary treating physician, and find it to be persuasive in showing that the physician was properly designated by applicant. As a properly designated primary treating physician, the RFAs submitted to defendant **[*743]** by Dr. Miller were subject to timely utilization review, but there is no evidence that occurred. A nonexistent utilization review is untimely per se and invalid under *Dubon II*. When a utilization review is invalid, the WCJ may award the requested medical treatment if it is supported by substantial medical evidence. (*Dubon II, supra*,79 Cal. Comp. Cases at p. 1300). [*Citations to the record omitted*]

The WCAB noted that the WCJ did not determine whether the medical treatment requested by Dr. Miller was supported by substantial evidence and should be awarded, because of his conclusion that the physician was not properly designated as Applicant's primary treating physician. The WCAB returned the case to the trial level for further proceedings regarding Dr. Miller's RFAs. The WCAB did not consider the WCJ's direction that Applicant be examined by a PQME in the field of psychology/clinical neuropsychology, because this was not a final order subject to reconsideration, and the WCAB found that removal was not justified. Finally, the WCAB agreed with the WCJ's exercise of discretion in declining to award sanctions against either party.

Defendant filed a Petition for Writ of Review, asserting in relevant respects that the WCAB erred as a matter of law when it found that Applicant properly designated Dr. Miller as his primary treating physician, and that the determinations made by Applicant's original treating physician and PQMEs after Applicant was discharged from active care and after proceeding pursuant to Labor Code §§ 4061 and 4062 could not be superseded by the findings of a new primary treating physician. According to Defendant, UR is not the proper procedure through which to resolve the medical dispute in this case, as the dispute involves whether Applicant has a chronic pain condition rather than a medical necessity issue.

WRIT DISMISSED and applicant's request for Labor Code § 5801 supplemental attorney's fees GRANTED May 29, 2015.

By the Court:

"A petition for writ of review may be sought only from a final order, decision, or award of the Workers' Compensation Appeals Board (appeals board). (Lab. Code §§ 5900, 5901; *Maranian v. Workers Comp. Appeals Bd.* (2000) 81 Cal. App. 4th 1068, 1074, 97 Cal. Rptr. 2d 418; 2 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed.) § 34.10[2], p. 34-9.) The petition is dismissed in that there is no final decision or order of the appeals board.

"The court finds that there was no reasonable basis for the petition. Accordingly, the case is remanded to the appeals board to determine a reasonable attorney's fee to be awarded to respondent for services rendered in connection with the petition for a writ of review. (Lab. Code, § 5801.)

"The request for sanctions under Labor Code sections 4607 and 5813 is denied in that it must be addressed to the appeals board."

Boren, P.J., Ashmann-Gerst, J. and Hoffstadt, J.

Counsel

For petitioners—Law Offices of Douglas W. Larr, by Douglas W. Larr

For respondent employee—Rowen, Gurvey & Win, by Alan Zane Gurvey