# 80 Cal. Comp. Cases 831

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Court of Appeal, Second Appellate District, Division Three

July 14, 2015 Writ of Review Denied

Civil No. B264229

**Reporter**
**80 Cal. Comp. Cases 831 *** | 2015 Cal. Wrk. Comp. LEXIS 94 **

## Warner Brothers, Time Warner Entertainment Company, Zurich American Insurance Company, Los Angeles, Petitioners v. Workers' Compensation Appeals Board, **Darlene Ferrona**, Respondents

**Prior History:**
[**1]

W.C.A.B. Nos. ADJ2263476 [VNO 0318779]—WCJ Debra Keyson (VNO); WCAB Panel: Deputy Commissioner Schmitz, Commissioner Sweeney, Zalewski [see Ferrona v. Warner Brothers, 2015 Cal. Wrk. Comp. P.D. LEXIS 220 (Appeals Board noteworthy panel decision)]

**Disposition:** Petition for writ of review denied

## Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

**Medical Treatment—Home Health Care—Utilization Review—WCAB affirmed WCJ's finding that applicant, who incurred cumulative industrial injury to her psyche and in form of fibromyalgia, was entitled to home health care services 24 hours per day, seven days per week, pursuant to opinion of her treating physician, A. Joseph Glaser, Ph.D., when defendant had agreed to provide home health care services 24 hours per day, seven days per week, in 2009 based on recommendations of agreed medical evaluators and again in 2014 after Dr. Glaser submitted request for authorization indicating applicant's continued need for home health care, and WCAB found that (1) [*832] defendant's utilization review denial of Dr. Glaser's 9/22/2014 request for authorization was moot**

**because defendant had already timely certified home health care by utilization review for one-year period 8/14/2014 to 8/14/2015, and, without conducting utilization review, voluntarily agreed to provide home health care services 24 hours per day, seven days per week, pursuant to request for authorization dated 8/22/2014, which was identical to 9/22/2014 request for authorization, (2) pursuant to *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision), which WCAB found applicable here, defendant was not entitled to unilaterally terminate applicant's home health care services without evidence of change in applicant's condition or circumstances to indicate that home care services were no longer reasonably required to cure or relieve from effects of industrial injury, and (3) Labor Code § 4600(h) did not require applicant to submit new prescription for each period of requested home health care services.**

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 5.04[6], 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.05[3], 4.10.]

## CALIFORNIA COMPENSATION CASES SUMMARY

Applicant suffered cumulative injury to her psyche and in the form of fibromyalgia while working for Defendant Warner Brothers from 9/94 through 5/12/95. On 11/8/2005, she received a Stipulated Award for 100 percent PD and future medical treatment.

On 9/29/2009, Defendant agreed to provide Applicant with 24-hour per day home health care, based on the recommendations of Applicant's treating and evaluating physicians. On 8/1/2014, A. Joseph Glaser, Ph.D., Applicant's treating physician at the time, issued a report recommending continuation of 24-hour home care. However, Dr. Glaser subsequently submitted an RFA mistakenly requesting home health care for only six hours of daily home care for four weeks, which Defendant authorized by UR on 8/15/2014. Dr. Glaser amended his request on 8/22/2014 to request 24-hour daily home care for eight weeks. Defendant did not submit the request to UR but provided the recommended care voluntarily.

On 9/22/2014, Dr. Glaser submitted a new RFA requesting home health care "24 hours/day X 7 days/wk." Defendant's URs dated 9/25/2014 and 9/29/2014 denied the request as not medically justified, and the denial was upheld by IMR. Defendant stopped providing home health care on 12/13/2014. Applicant subsequently requested an expedited hearing regarding her entitlement to home health care services, and the matter was heard on the sole issues of whether Defendant timely denied Dr. Glaser's RFA for home health care so as to take the issue outside the WCAB's jurisdiction and, if not, whether the treatment requested was reasonably required and based on substantial medical evidence.

On 1/21/2015, the WCJ issued an F&O finding that home health care services were timely certified by Defendant's UR for the period 8/14/2014 to 8/14/2015, and that Dr. Glaser's opinions were substantial evidence supporting Applicant's need for home health care services 24 hours per day, seven days per week. In her Opinion on Decision, the WCJ explained that, pursuant to *Patterson v. The Oaks* **[*833]** Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board Significant Panel Decision), Defendant was not entitled to unilaterally cease home health care services absent a showing that Applicant's circumstances had changed. Here, the WCJ

determined, there was no showing of changed circumstances since the date UR certified home health care for the one-year period beginning 8/14/2014, as found by the WCJ. The WCJ noted that it was not necessary for Applicant to submit another RFA to challenge Defendant's termination of home health care because, under *Patterson*, it was Defendant's burden to show that the continued provision of services was no longer reasonable and necessary.

Defendant filed a Petition for Reconsideration, contending in relevant portion that the WCJ erred in awarding home health care because UR certified home health care services for only four weeks during the year and not for the full year, and Defendant provided the home health care services requested. Defendant further contended that the 9/25/2014 and 9/29/2014 UR decisions in response to Dr. Glaser's 9/22/2014 RFA were timely issued and that, therefore, the WCJ, pursuant to *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion) (*Dubon II*), had no jurisdiction to review them. Applicant's remedy was to seek appeal of the subsequent IMR determination under Labor Code § 4610.6(h). In addition, Defendant asserted that Applicant did not comply with the prescription requirement in Labor Code § 4600(h) until 8/2014, so that she was not entitled to home health care services before that time and was required to obtain a new prescription after 8/2014, and that *Patterson* did not apply because home health care services may be provided only pursuant to a prescription.

Applicant filed a response, asserting in pertinent portion that Defendant improperly terminated the home health care it had agreed to provide in 2009 without showing changed circumstances, that it was not necessary for Applicant to file an RFA to justify reinstatement of services, and that, since Defendant did not meet its burden of showing that 24/7 home care services were no longer reasonably required due to a change in Applicant's condition or circumstances as required by *Patterson*, Defendant was required to continue providing such services pursuant to the 2009 agreement.

The WCJ recommended that reconsideration be denied, explaining in her report that she found Defendant's UR denial of Dr. Glaser's 9/22/2014 RFA to be moot because Defendant had already agreed, without UR, to provide home health care services pursuant to the RFA dated 8/22/2014, which was identical to the 9/22/2014 RFA, and that Defendant did not show that Applicant's condition or circumstances had changed in that period of time as required under *Patterson*. Since Defendant did not terminate home care services pursuant to a valid UR, the WCJ found that she had jurisdiction to address the medical treatment issue and that the medical reports and RFAs for home care constituted substantial evidence to support her award in accordance with *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal. Comp. Cases 682 (Appeals Board en banc opinion).

**[*834]**

The WCAB, adopting and incorporating the WCJ's report, denied reconsideration. In its decision, the WCAB stated that it found no merit to Defendant's contention that Labor Code § 4600(h) requires an injured worker to obtain renewed or updated prescriptions in order to continue ongoing home health care services. Additionally, quoting from its decision in *Patterson*, which involved an applicant's entitlement to continued nurse case manager services, the WCAB explained that, when seeking to terminate approved medical treatment, it is

a defendant's burden to show that the injured worker's circumstance or condition has changed, not the worker's obligation to continually prove the necessity of the desired treatment:

Defendant acknowledged the reasonableness and necessity of nurse case manager service[s] when it first authorized them, and applicant does not have the burden of proving their ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the services is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization and starting the process over again. (*Id.* at p. 918.)

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Applicant has no obligation to continually show that the use of a nurse case manager is reasonable medical treatment. Instead, once defendant authorized nurse case manager services as reasonable medical treatment, it became obligated to continue to provide those services until they are no longer reasonably required under section 4600 to cure or relieve the effects of the industrial injury. Like all medical treatment decisions, that determination must be based upon substantial medical evidence. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal. 3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal. Comp. Cases 310]; *LeVesque v. Workmens' Comp. Appeals Bd.* (1970) 1 Cal. 3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal. Comp. Cases 16].

Here, the WCAB pointed out, Defendant agreed to provide home health care services in 2009 and provided those services through at least 2011, based on the recommendations of the AMEs. Thereafter, although the specific date was not clear from the record, Defendant unilaterally terminated services. However, in 8/2014 Dr. Glaser concluded that the home health care services should continue and he did not foresee any change in Applicant's condition. Applying *Patterson*, the WCAB concluded that Defendant was not entitled to unilaterally terminate Applicant's home health care services because there was no evidence of a change in Applicant's circumstances or condition showing that the services were no longer reasonably required, and Applicant did not have to produce a new prescription in order for Defendant to have liability.

Defendant filed a Petition for Writ of Review, asserting in pertinent portion that the WCAB had no jurisdiction to determine Applicant's entitlement to home health care because Defendant issued timely UR denials of the requested treatment **[*835]** on 9/25/2014 and 9/29/2014, which were upheld by IMR. Furthermore, Defendant argued that the WCAB's award of home health care was improper because there was no valid prescription as described in Labor Code § 4600(h), and the WCAB improperly shifted the burden of proof to Defendant to show that the treatment was unnecessary. Defendant also asserted that Applicant could not satisfy her burden of demonstrating the need for home health care only one time to be entitled to continued services, but rather had an ongoing obligation to demonstrate the necessity of the requested treatment, and that the holding in *Patterson* did not apply here because *Patterson* specifically involved nurse case managers and was not intended to be applied more broadly to other forms of medical treatment.

Applicant filed an Answer, asserting in relevant respects that the WCAB had jurisdiction under *Dubon II* to determine the home health care issue after finding that Defendant did not

submit a timely UR to the 8/22/2014 RFA, and that the WCAB properly interpreted the decision in *Patterson* and correctly applied its holding to determine that Defendant was precluded from unilaterally terminating home health care without establishing a change in Applicant's condition. Applicant also requested an award of reasonable attorney's fees pursuant to Labor Code §§ 4607and 5801.

WRIT DENIED and Applicant's request for attorney's fees DENIED July 14, 2015.

By the Court:

"The petition for a writ of review and the request for attorney's fees pursuant to Labor Code section 5801 are both denied. The request for attorney's fees pursuant to Labor Code section 4607 is for the Workers' Compensation Appeals Board to hear and determine."

# Counsel

For petitioners—Stockwell, Harris, Woolverton & Muehl, by Joel S. Allen

For respondent employee—Law Firm of Rowen, Gurvey & Win, by Alan Z. Gurvey

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