

Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

SAN DIEGO LOS ANGELES ORANGE COUNTY INLAND EMPIRE

WWW.TIDLAW.COM

OCTOBER 2018

OFFICES THROUGHOUT SOUTHERN CALIFORNIA

SAN DIEGO

1455 Frazee Rd, Ste 650
San Diego, CA 92108
Phone: 619-232-7181
Fax: 619-232-8423

ORANGE COUNTY

1851 East 1st St, Ste 410
Santa Ana, CA 92705
Phone: 714-547-4450
Fax: 714-547-3355

LOS ANGELES

131 North El Molino Ave, Ste
200
Pasadena, CA 91101
Phone: 626-247-1180
Fax: 626-247-1184

DEFENDANT'S LIABILITY FOR DISABILITY BENEFITS RELATED TO SELF-PROCURED SURGERY DENIED BY UTILIZATION REVIEW/IMR

The issue was addressed in a September 2017 WCAB Panel decision in the matter of *Belinda Go v. Sutter Solano Medical Center* (2017) Cal.Wrk.Comp.P.D. LEXIS 412. The case was later appealed and the writ denied by the Court of Appeal, First Appellate District in January 2018, 83 Cal.Comp.Cases 381. The result in this noteworthy Panel decision is citable authority. While the decision is not binding precedent, the WCAB will consider this decision to the extent that it finds their reasoning persuasive.

FACTS OF THE CASE

The matter proceeded to trial in May 2017 on the issues of temporary disability and permanent disability. Belinda Go, while employed on June 9, 2013 as a registered nurse, sustained injury arising out of and in the course of her employment to her neck. On May 7, 2015, a treating doctor submitted a Request for Authorization (RFA) for cervical spine surgery which was non-certified by Utilization Review (UR). The non-certification was upheld by Independent Medical Review (IMR) on July 22, 2015. Between May 5, 2015 and November 20, 2015, Ms. Go received temporary total disability benefits.

Applicant's treating doctor declared her Permanent and Stationary on September 11, 2015 and assigned a 5% WPI to the neck disability which rated to 7% after valid apportionment. Ms. Go attempted to return to work as of November 20, 2015 and continued to work until March 22,



:: www.TIDLAW.COM ::

2016. In the face of the UR denial and IMR affirming that denial, she self-procured her neck surgery on March 28, 2016. Ms. Go was off work from March 22, 2016 through June 6, 2016 for the surgery. After surgery, she was evaluated by Panel Qualified Medical Evaluator, Marvin Zwerin D.O. who found her to be Permanent and Stationary as of July 28, 2016 and assigned a 17% WPI to her neck disability, which rated to 23% after valid apportionment.

DEFENDANT DISPUTED NON AUTHORIZED POST-SURGICAL DISABILITY BENEFITS

In the *Go* matter, defendant contended that because the surgery was denied by UR and IMR, they had no liability for the increased permanent disability or the additional period of temporary disability both caused by the surgery. The trial judge disagreed and based on the surgery awarded a period of temporary disability through June 6, 2016 and permanent disability based on the rating of the post-surgical PQME report of Dr. Zwerin.

Defendant appealed the trial judge's findings that applicant was entitled to the indemnity Award of post-surgical temporary disability. The WCAB Panel upheld the Award of temporary disability, analyzing a string of cases involving temporary disability claims after unauthorized surgeries. Referenced cases included *Barela v. Leprino Foods* (2009), *Ribeiro v. WCAB* (2015), *Bucio v. County of Merced* (2015), *Valdez v. WCAB* (2013) and the recent case of *Hikida v. WCAB* (2017). Defendants' Petition for Reconsideration was denied.

AWARD OF INDEMNITY BENEFITS RELATED TO SELF-PROCURED SURGERY - THE BARELA CASE

Defendant cited *Ribeiro v. WCAB, Gus Jr. Restaurant* (2009) 80 Cal. Comp. Cases 1222. Interestingly, although this decision supported defendant's claim which relies on the AME report finding the self-procured surgery was not medically reasonable or necessary, the *Ribeiro* decision cited another case, a panel decision, *Barela v. Leprino Foods*, 2009 Cal. Wrk. Comp. P.D. Lexis 482. In *Barela*, the Board upheld the judge's decision that because the AME found that the self-procured lumbar surgery relieved the applicant's symptoms, it was reasonable medical treatment. That surgery had been denied by UR; but because the surgery

was found to be reasonable by the AME, in retrospect, the increased permanent disability post-surgery and periods of temporary disability related to the surgery were determined to be reasonable. The Board opined in *Barela* that no statute prohibits an injured worker from self-procuring medical treatment.

With regard to permanent disability, Labor Code section 4660 mandates use of the AMA Guides and the 2005 Schedule. Nothing in Section 4660, the AMA Guides, or the 2005 Schedule limited an applicant's entitlement to permanent disability merely because a treating physician's request for authorization to perform spinal surgery was at some point lawfully denied, or because the employee at some point reasonably self-procured the surgery.

In *Barela*, defendant did not rebut the presumption under section 4660 that the 2005 Schedule "shall be prima facie evidence of the percentage of permanent disability" to be attributed to an injury. Showing that an employee self-procured medical treatment is not evidence within "the four corners of the AMA Guides" that contradicts and overcomes the prima facie correctness of the permanent disability rating calculated by the DEU using the AMA Guides and the 2005 Schedule. It also makes no difference that the surgery was not authorized or that it was self-procured. The AME expressly concluded in his report, albeit in hindsight, the surgery "was both reasonable and necessary." That conclusion was found supported by applicant's credible testimony that the surgery relieved the symptoms of his back injury.

Although *Barela* is a Panel decision, the "rationality" was considered by the WCAB in *Ribeiro*, which is a designated significant panel decision. The Board in *Ribeiro* upheld a trial judge's decision based on a retrospective opinion by the AME. This means retrospective medical-legal reports can be used to support an award of temporary or permanent disability caused by medical treatment that was non-certified by Utilization Review and IMR.

Returning to the *Go* case, the treating doctor performed the Permanent & Stationary evaluation before the self-procured surgery, noting complaints of right neck and scapular pain and arm pain. The applicant had surgery on March 28, 2016

and was then seen by PQME Dr. Zwerin who described that her subjective complaints were still present but the pain complaints were much reduced. He stated "UR/IMR notwithstanding, the ultimate validity of the decision to operate at C5-6 is substantial by the outcome thereof, evidenced by both an immediate decrease in neck and arm pain and complete cessation of radicular pain in the right arm."

As such, the trial judge determined that applicant was entitled to the post-surgical period of temporary disability and for permanent disability following the surgery because the treatment proved to be reasonable by its positive outcome, stating the permanent disability post-surgical is applicable. In addition, temporary disability from the date of surgery until the permanent disability date was held reasonable.

TEMPORARY DISABILITY OVERPAYMENT DISALLOWED

Defendants were claiming a temporary disability overpayment from the Permanent and Stationary date found by the treating doctor on September 11, 2015 until November 20, 2015. The overpayment was disallowed based on the findings of PQME Dr. Zwerin. Dr. Zwerin stated in his reports the Permanent and Stationary date chosen by the treating physician was incorrect and severely premature in the face of a recommendation for spinal surgery though the surgery did not occur until March 28, 2016.

ISSUES FOR PRACTITIONER TO PONDER

Admittedly, it may be difficult to convince a physician to opine that a surgery was not reasonable, after the fact, if the results were positive for the injured worker. If, however, a defendant is able to persuade a medical-legal evaluator to opine retrospectively that a previously UR and IMR denied surgery was not beneficial for the applicant, applying the rationale in these line of cases, including *Ribeiro*, this medical legal opinion could support an argument for the denial of post-surgical temporary disability or permanent disability demand.

In most cases, for the injured worker to secure the care they need and an income stream if they do not return to work, they look to another payment source for the wage loss indemnity (usually SDI) and the self-procured

treatment/surgery (private medical) giving rise to liens in the case. However, there is now an adequate and reliable line of cases that establish an applicant's right to pursue self-procured under Labor Code 4605 and later hold defendant responsible for corresponding disability benefits even though medical treatment was legally denied.

Disclaimer: This newsletter is provided to share knowledge and expertise with our colleagues with the goal that all may benefit. The content of this newsletter is for general informational purposes only and is not intended to serve as legal advice or as a guarantee, warranty, or prediction regarding the outcome of any particular legal matter. Nothing contained within this newsletter should be used as a substitute for legal advice and does not create an attorney-client relationship between the reader and Trovillion, Inveiss & Demakis. Legal advice depends on the specific facts and circumstances of each individual's situation. You should not rely on this newsletter without first consulting with a qualified, licensed attorney.