WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE DUBON,

Applicant,

vs.

WORLD RESTORATION, INC.; and STATE COMPENSATION INSURANCE FUND,

Defendants.

Case Nos. ADJ4274323 (ANA 0387677)
ADJ1601669 (ANA 0388466)

OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

The Appeals Board previously granted applicant's Petition for Reconsideration to further study the factual and legal issues presented. Thereafter, to secure uniformity of decision in the future, the Chairwoman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[1]

Applicant sought reconsideration of the Findings and Order issued by the workers' compensation administrative law judge (WCJ) on September 23, 2013. In that decision, the WCJ found that any disputes over alleged procedural defects in defendant's utilization review (UR) denial must be resolved through the independent medical review (IMR) process; therefore, even if defendant's UR was procedurally defective, the Workers' Compensation Appeals Board (WCAB) cannot decide whether to allow the back surgery recommended by applicant's treating physician.

In his petition, applicant contends: (1) where a defendant's UR is procedurally deficient, the WCAB has jurisdiction to determine whether a recommended treatment is reasonably necessary;

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[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (*Ochoa*) (2006) 142 Cal.App.4th 790, 796, fn. 2 [71 Cal.Comp.Cases 1044]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

(2) Labor Code section 4610.5(e),[2] which provides that a UR decision may be reviewed only by IMR, presupposes a valid UR decision; (3) section 4610.6(a) specifically limits IMR to "an examination of the medical necessity of the disputed medical treatment" and, therefore, IMR cannot consider the UR's procedural adequacy; and (4) without access to the WCAB, there is no remedy for a procedurally defective and invalid UR determination.

Based on our review of the relevant statutes, regulations, and case law, we hold:

1. IMR solely resolves disputes over the medical necessity of treatment requests. Issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB.
2. A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination.
3. If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required.
4. If there is a timely and valid UR, the issue of medical necessity shall be resolved through the IMR process if requested by the employee.

Here, we conclude that the defendant's UR process suffers from material procedural defects that undermine the integrity of the UR decision because the UR physicians were not provided with adequate medical records. Accordingly, we rescind the WCJ's September 23, 2013 decision and return the matter to her for further proceedings and a decision on whether the spinal surgery in question is reasonably required.

I. BACKGROUND

In 2003 and 2004, applicant sustained industrial injuries to his spine and other body parts while employed by World Restoration, Inc., the insured of defendant, State Compensation Insurance Fund

[2] Unless otherwise specified, all further statutory references are to the Labor Code.

(SCIF). Applicant's primary treating physician for both injuries has been Mark W. Brown, M.D. His consulting orthopedic surgeon has been Albert Simpkins, Jr., M.D. The agreed medical evaluator (AME) in orthopedics has been Israel Rottermann, M.D.

Applicant's treating physicians have been considering spinal surgery for approximately three years. Their discussions regarding spinal surgery have been based on applicant's persistent symptoms of pain, numbness, and tingling and various objective tests. Among other things, EMG/NCV studies of April 28, 2011 indicated that applicant had left L4-5 radiculopathy. Also, a June 8, 2011 lumbar MRI showed that applicant had disc protrusions at L1-2 and L4-5. A January 19, 2012 report of AME Rottermann found that applicant needed a discogram. The April 8, 2013 operative report of Michael H. Lowenstein, M.D., found that applicant's discogram was positive for concordant discogenic pain at L4-5 and L5-S1.

On May 6, 2013, Dr. Brown referred applicant to Dr. Simpkins for evaluation and treatment in light of the lumbar discogram.

In a report dated July 1, 2013, Dr. Simpkins requested authorization to perform an anterior and posterior fusion from L4 through S1 with decompression.[3]

On July 19, 2013, Bunch CareSolutions, SCIF's UR agent, sent Dr. Simpkins a letter denying authorization for surgery as not medically necessary. The letter was based on the July 19, 2013 report of SCIF's UR physician, Donald A. deGrange, M.D., a board certified orthopedic surgeon.

Dr. deGrange's report said that he reviewed Dr. Simpkins's July 1, 2013 report, the June 8, 2011 lumbosacral MRI, and "18 additional pages of medical records." Dr. deGrange did not specify what these "18 additional pages of medical records" were. Moreover, nothing in his report reflects that he reviewed: (1) any of the reports of Dr. Brown; (2) any of the reports of Dr. Simpkins, other than the July 1, 2013 report; (3) the AME report of Dr. Rottermann; or (4) Dr. Lowenstein's April 8, 2013 operative report regarding the discogram.

[3] This report was admitted in evidence as the July 1, 2013 report of Dr. Simpkins, but it was not actually signed until July 8, 2013 and not received by defendant until July 11, 2013. Applicant never challenged the timeliness of defendant's UR denial.

Nevertheless, Dr. deGrange's report determined that spinal surgery was not medically necessary. In essence, he found that: (1) there was no documented imaging of nerve root compression or of moderate or greater stenosis (i.e., central canal stenosis, lateral recess stenosis, or neural foraminal stenosis) at each of the requested levels; (2) there was no evidence that conservative treatment had failed; and (3) there was no documentation of a condition/diagnosis for which spinal fusion was indicated.

Dr. Simpkins invoked Bunch CareSolutions's internal UR appeal process.[4] On August 2, 2013, a second UR denial was issued based on the report of board certified orthopedic surgeon Kevin Mark Deitel, M.D. In all significant respects, this report was identical to that of Dr. deGrange.

On August 12, 2013, applicant signed an application for IMR.

On August 14, 2013, applicant filed a declaration of readiness (DOR) for an expedited hearing regarding his entitlement to spinal surgery. In the DOR, applicant contended that defendant's UR denial was defective because, among other reasons, there was insufficient record review.

The expedited hearing took place on September 9, 2013.

On September 23, 2013, the WCJ issued her decision. In her Opinion on Decision, the WCJ observed that: (1) Dr. deGrange did not identify the 18 pages of additional medical records he reviewed, in violation of section 4610(g)(4) and AD Rule 9792.9.1(e)(5)(D) (Cal. Code Regs., tit. 8, § 9792.9.1(e)(5)(D); see also § 9792.9(l)(3));[5] and (2) there was "a wealth of medical records" that Dr. deGrange did not review, including all reports of Dr. Brown, the reports of Dr. Simpkins (other than the July 1, 2013 report), the AME report of Dr. Rottermann, and the discogram report of Dr. Lowenstein. The WCJ said that Dr. deGrange's failure to review all of the relevant medical records "was a critical error" because "the determination [of medical necessity] is made in part based upon the severity of pain, duration of pain, radiculopathy as well as a review as to whether conservative care had been undertaken."

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[4] The Rules of the Administrative Director (AD) allow a defendant's UR procedures to provide for an optional "internal" appeal of the initial UR decision; however, the AD's Rules further specify that "the internal appeals process is a voluntary process that neither triggers nor bars use of the dispute resolution procedures of Labor Code section 4610.5 and 4610.6, but may be pursued on an optional basis." (Cal. Code Regs., tit. 8, § 9792.9.1(e)(5)(J).)

[5] The AD Rules to which the WCJ's decision referred were emergency regulations that became operative on January 1, 2013. The AD's final IMR regulations became effective on February 12, 2014. The emergency and final regulations are the same in all relevant respects.

The WCJ added that a UR physician "is compelled by ACOEM to look at objective testing performed coupled with subjective complaints, history of radiculopathy, and history of conservative care" and that "a complete review of applicant's medical condition and prior treatment … is especially important when utilizing ACOEM Guidelines in determining whether treatment should be authorized."

Despite the procedural defects with defendant's UR that the WCJ identified, she concluded that any alleged procedural defects must be resolved through IMR. The WCJ further concluded that the WCAB cannot allow the surgery recommended by Dr. Simpkins because the issue of medical necessity must be determined by IMR.

Applicant then filed his timely Petition for Reconsideration. Defendant filed an Answer, and the WCJ prepared a Report and Recommendation (Report) recommending that the Petition be denied.[6]

The Appeals Board granted reconsideration to further study the factual and legal issues presented.[7]

II. LEGISLATIVE AND REGULATORY HISTORY

In 2003, Senate Bill (SB) 228 was enacted. (Stats. 2003, ch. 639.) Among other things, SB 228 added section 4610. (*Id*. at § 28.) Section 4610(b) requires that "[e]very employer *shall* establish a utilization review process *in compliance with this section*." (Italics added.) When a defendant disputes a treatment request from an injured worker's doctor, a UR physician must determine, based on "medical necessity," whether to approve, modify, or deny the requested treatment. (Lab. Code, § 4610(a), (c), (e), (g)(4).) Section 4610(c) requires that "[e]ach utilization review process *shall* be governed by written policies and procedures" (italics added.) and section 4610(g) mandates that certain procedural requirements "*shall* be met" (italics added).

In 2004, SB 899 was enacted. (Stats. 2004, ch. 34.) It amended section 4062 to allow an

[6] Both defendant's Answer and the WCJ's Report pointed out that, when filed, applicant's Petition was unverified. Applicant, however, subsequently cured the verification defect. (*Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision).)

[7] The order granting reconsideration concluded that the WCJ's Findings and Order was a "final" decision subject to reconsideration because it decided a "threshold" issue that is "fundamental," "critical," or "basic" to determining an injured employee's entitlement to benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-1081 [65 Cal.Comp.Cases 650].)

employee who objected to a section 4610 UR determination to obtain a comprehensive medical-legal report from an AME or a qualified medical evaluator (QME) under newly adopted sections 4062.1 and 4062.2. (*Id*. at § 14; see also §§ 16, 18.)

In 2012, SB 863 was enacted. (Stats. 2012, ch.363.) It amended the procedure for resolving post-UR disputes over the "medical necessity" of treatment requests, but it did not change the procedural requirements of section 4610 for UR determinations. In its statement of purpose, the Legislature said:

> "The Legislature finds and declares all the following: … (e) [t]hat having medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to using evidence-based medicine to provide injured workers with the highest quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy."
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> (Stats. 2012, ch. 363, § 1(e) [uncodified]; see also § 1(d), (f), (g).)

To effectuate this purpose, the Legislature amended sections 4062 and 4610 so that an injured employee could no longer use the AME/QME process to dispute a UR determination. (Stats. 2012, ch. 363, §§ 28, 43.) Instead, sections 4610.5 and 4610.6 were adopted (Stats. 2012, ch. 363, §§ 45, 46), introducing a new procedure whereby an injured worker who disputes a UR decision may request IMR. Under sections 4610.5 and 4610.6, the IMR physician is limited to evaluating the "medical necessity" of the proposed treatment. (Lab. Code, §§ 4610.5(c)(2), (c)(3), (k), 4610.6(a), (c), (e).)

As amended by SB 863, however, section 4604 still vests the WCAB with jurisdiction to determine all non-medical disputes regarding timeliness and other procedural matters governing UR. (Stats. 2012, ch. 363, § 40.) Specifically, section 4604 provides that: "[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5*." (Italics added.)

In 2013, based on the foregoing statutory provisions and on its general rulemaking authority (Lab. Code, § 5307(a)(1); see also §§ 133, 5309, 5708), the WCAB adopted Rule 10451.2(c)(1), which provides, in relevant part:

> "Where applicable, independent medical review (IMR) applies solely to disputes over the necessity of medical treatment where a defendant has conducted a timely and otherwise procedurally proper utilization review (UR). … All other medical

> treatment disputes are non-IMR[] disputes. Such non-IMR[] disputes shall include, but are not limited to: … (C) a dispute over whether UR was timely undertaken or was otherwise procedurally deficient; however, if the employee prevails in this assertion, the employee … still has the burden of showing entitlement to the recommended treatment …"
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> (Cal. Code Regs., tit. 8, § 10451.2(e).)

Based on the provisions of Rule 10451.2 and on our interpretation of the relevant law, we reach the following holdings.

III. DISCUSSION

A.

IMR SOLELY RESOLVES DISPUTES OVER THE MEDICAL NECESSITY OF TREATMENT REQUESTS. ISSUES OF TIMELINESS AND COMPLIANCE WITH STATUTES AND REGULATIONS GOVERNING UR ARE LEGAL DISPUTES WITHIN THE JURISDICTION OF THE WCAB.

Rule 10451.2(c)(1)'s provision that IMR "applies solely to disputes over the necessity of medical treatment" derives from the language of sections 4610, 4610.5, and 4610.6.

Under section 4610, when a defendant disputes a treatment request a UR physician determines the "medical necessity" of the proposed treatment. (Lab. Code, § 4610(a), (c), (e), (g)(4).) Section 4610(b) requires that "[e]very employer *shall* establish a utilization review process *in compliance with this section*" (italics added), and section 4610(c) requires that "[e]ach utilization review process *shall* be governed by written policies and procedures" (italics added). Among other things, to be in compliance with section 4610, a UR physician is expected to obtain information reasonably necessary to the UR decision (Lab. Code, § 4610(d), (g)(1), (g)(2), (g)(4), (g)(5)) and the UR decision must be made within specified deadlines. (Lab. Code, § 4610(g)(1), (g)(2), (g)(3)(A).)

Under section 4610.5, upon a timely request by the injured employee, an IMR physician reviews the UR decision. (Lab. Code, § 4610.5(a)(1), (a)(2), (c)(1), (c)(3), (d), (e).) In reviewing the UR decision, however, the sole focus of the IMR physician is the medical necessity of the proposed treatment. (Lab. Code, §§ 4610.5(c)(2), (c)(3), (k), 4610.6(a), (c), (e).) Because the role of an IMR physician is limited to assessing medical necessity, disputes over whether a UR decision is timely and/or

procedurally proper must be resolved solely by the WCAB. (Lab. Code, § 4604 ["[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5*" (italics added)].)[8]

Our conclusion that IMR physicians cannot determine whether a UR decision is untimely or procedurally deficient is consistent with the Legislature's declaration regarding IMR in uncodified section 1(e) of SB 863, quoted above. (Stats. 2012, ch. 363, § 1(e); see also § 1(d), (f), (g).) This declaration reflects a legislative intent that IMR physicians are to address medical necessity issues using evidence-based medicine standards. Section 1(e) in no way indicates a legislative intent that IMR physicians may address legal issues such as the timeliness or procedural sufficiency of UR. Indeed, nothing in section 1(e) or in sections 4610.5 and 4610.6 suggests that IMR physicians will have the knowledge or expertise to decide whether a UR decision was untimely or procedurally deficient. (See also Lab. Code, §§ 4610.6(b) (referring to the IMR physicians as *medical* reviewer[s]" [italics added]; 4610.6(e), (f) (referring to the IMR physicians as "*medical* professionals" [italics added].)

B.

A UR DECISION IS INVALID IF IT IS UNTIMELY OR SUFFERS FROM MATERIAL PROCEDURAL DEFECTS THAT UNDERMINE THE INTEGRITY OF THE UR DECISION. MINOR TECHNICAL OR IMMATERIAL DEFECTS ARE INSUFFICIENT TO INVALIDATE A DEFENDANT'S UR DETERMINATION.

1.

As discussed above, section 4610(b) requires that "[e]very employer *shall* establish a utilization review process *in compliance with this section*." (Italics added.) Moreover, section 4610 mandates that when a UR determination is made, certain procedural requirements "shall be met" (Lab. Code, § 4610(g)), including that the decision "shall" be made within specified deadlines. (Lab. Code, § 4610(g)(1), (g)(2), (g)(3)(A).) Of course, "shall" is mandatory language. (Lab. Code, § 15; *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357 ("As used in the Labor Code, 'shall' is mandatory").)

[8] Section 4610.5(k) gives the AD the authority to approve or disapprove an IMR request. However, there is nothing in the Labor Code or in the AD's Rules which suggest that, in making this determination, the AD (or the IMR physician) may consider whether the underlying UR decision was untimely or otherwise procedurally defective. (Lab. Code, § 4610.5(h)(2), (k); Cal. Code Regs., tit. 8, § 9792.10.3.)

Therefore, an untimely UR decision is invalid.

This conclusion is consistent with the Supreme Court's decision in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*). There, the Supreme Court held that a defendant must conduct UR for all medical treatment disputes and that, if a defendant fails to meet the timelines for UR under section 4610, it may not object to the recommended treatment through the procedures of section 4062. (*Id.* at pp. 236-237, 244-245.) In so holding, *Sandhagen* acknowledged the earlier holdings of the Appeals Board (en banc) and of the Court of Appeal that UR deadlines "are mandatory and [a defendant's] failure to meet the deadlines means that, with respect to the particular medical treatment dispute in question, [the defendant is] precluded from using the utilization review process, or any utilization review report it obtained to deny treatment." (*Id.* at p. 235; see also p. 236.)

2.

The scope of section 4610's requirements that "[e]very employer *shall* establish a utilization review process *in compliance with this section*" (§ 4610(b) (italics added)) and that "[e]ach utilization review process *shall* be governed by written policies and procedures" (§ 4610(c) (italics added)) is not limited to its timeliness mandates. Section 4610 expressly indicates that UR decisions should be based on the "information" that is "reasonably necessary" to make the determination and that, if a decision to delay or deny is based on "incomplete or insufficient information," the UR decision shall specify the additional information needed. (Lab. Code, § 4610(d), (g)(1), (g)(2), (g)(4), (g)(5).) Furthermore, section 4610 and the statutory scheme of which it is a part also contemplate compliance with the AD's Rules on UR procedures. (Lab. Code, §§ 4610(c), (g)(3)(A), (i), 4603.5 ("The administrative director shall adopt rules … necessary to make effective the requirements of this article").) Accordingly, just as an untimely UR is invalid, a UR that fails to comply with the procedural requirements of section 4610 and the AD's Rules may also be invalid.

Judicial scrutiny of the procedural validity of a UR decision is of particular importance since SB 863 amended the Labor Code to bar an injured worker from renewing a treatment request for 12 months absent a documented material change in circumstances. (Lab. Code, § 4610(g)(6).) Furthermore,

requiring strict compliance with mandatory time limits and other regulations governing UR will ensure the integrity of the UR process and the decisions rendered. This result will be beneficial to the workers' compensation system as a whole.

3.

Not all procedural violations of section 4610 or the AD's Rules render a UR decision invalid. Instead, a UR decision is invalid only if it suffers from material procedural defects that undermine the integrity of the UR decision.

In interpreting a statute, we must "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Estate of Griswold* (2001) 25 Cal.4th 904, 911 [internal quotation marks omitted]; also, e.g., *Medrano v. Workers' Comp. Appeals Bd.* (2008) 167 Cal.App.4th 56, 64 [73 Cal.Comp.Cases 1407].) Moreover, the provisions of a statute "must [be] consider[ed] in the context of … the statutory scheme of which it is a part" and "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286]; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1] ("The words of the statute must be construed in context … and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.").)

Section 4610(g)(3)(A) states that, if a physician's treatment request "is not approved in full," then any "disputes [regarding the UR decision] *shall be resolved pursuant to Section 4610.5*, if applicable … ." (Italics added.) In turn, section 4610.5(e) states "[a] utilization review decision may be reviewed or appealed *only by independent medical review* pursuant to this section." (Italics added.) These statutory provisions, standing alone, evidence the Legislature's intent that IMR should be the vehicle for reviewing a UR decision regarding the medical necessity of a proposed treatment.

Furthermore, as discussed above, uncodified section 1 of SB 863 expressly states:

> "The Legislature finds and declares all of the following: … (e) That having medical professionals ultimately determine the necessity of requested treatment furthers the

social policy of this state [of] using evidence-based medicine to provide injured workers with the highest quality of medical care and that … establishing independent medical review [is] necessary to implement that policy." (See also § 1(d), (f), (g).)

Harmonizing the language of sections 4610 and 4610.5, and taking into consideration the expressly declared legislative intent set forth in uncodified section 1 of SB 863, we conclude that a UR decision is invalid if it suffers from material procedural defects that undermine the integrity of the UR decision. If, however, there are only minor technical or immaterial defects, a defendant's UR determination remains fully subject to the IMR process.

This conclusion is consistent with the constitutional mandate that "the administration of [workers' compensation] legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [*sic*] of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government." (Cal. Const., art. XIV, § 4.) If a UR decision results from material procedural defects that undermine the integrity of the UR decision, substantial justice is not accomplished. However, the general rule is that de minimis technical violations of the UR procedures or other immaterial defects do not contravene the constitutional mandate of accomplishing substantial justice. (Cf. Cal. Const., art. VI, § 13 ("No judgment shall be set aside … for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."); Code Civ. Proc., § 475 ("The court must, in every stage of an action, disregard any error, … which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error … unless it shall appear from the record that such error … was prejudicial, and also that by reason of such error … the said party complaining or appealing sustained and suffered substantial injury ..."); *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200 [50 Cal.Comp.Cases 160] ("[P]rocedural rules serve the convenience of the tribunal and the litigant[s] and facilitate the proceedings. They do not deprive the tribunal of the power to dispense with compliance when the purposes of justice require it, particularly when the violation is formal and does not substantially prejudice the other party." [internal quotation marks omitted]); *Klein v. Superior Court* (1988) 198 Cal.App.3d 894, 908 ("Judicial scrutiny is

necessary to prevent technicalities from overcoming substantial justice").) To conclude otherwise would elevate form over substance and would be antithetical to the Legislature's intent in establishing IMR.

4.

The right to have a UR decision reviewed through IMR is exclusively that of the employee (Lab. Code, § 4610.5(d)) and presupposes a valid UR determination. If a UR decision is invalid because its integrity was undermined due to the defendant's failure to provide the UR physician with adequate medical records or because the UR physician failed to consider them, there is no valid UR determination and no basis for the employee to invoke IMR. Although both the defendant and employee may submit medical records and reports to the IMR organization (Lab. Code, § 4610.5(l)(1), (f)(3); see also Cal. Code Regs., tit. 8, § 9792.10.5(a)(1), (f)(3), (h)(1)), a defendant may not use this as a vehicle to cure defects in its UR process if the UR decision has been found invalid.

This conclusion is consistent with the Supreme Court's decision in *Sandhagen*, in which the Court stated:

> "[W]e conclude that the Legislature intended for the utilization review process to be employers' only avenue for resolving an employee's request for treatment. [¶] We also conclude that section 4062 is *not* available to employers as an alternative avenue for disputing employees' requests for treatment."
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> (*Sandhagen, supra*, at p. 992 (italics in original).)

Although the second tier of the process was different at the time of *Sandhagen* – i.e., SB 899 allowed the employee to have a UR decision reviewed by a QME or an AME whereas SB 863 now allows the employee to request review by an IMR physician – the Court's reasoning is equally applicable here.

The need for a UR physician to be provided with and review sufficient medical records to determine the medical necessity of a treatment request and to disclose what those records are goes to the very core of a UR decision. To allow these statutory and regulatory requirements to be inadvertently neglected or deliberately disregarded would render UR decisions unreliable, possibly flawed and ultimately would defeat the purpose of having UR at all, while at the same time adding an extra layer of delay to the medical treatment resolution process.

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C.

IF A DEFENDANT'S UR IS FOUND INVALID, THE ISSUE OF MEDICAL NECESSITY IS NOT SUBJECT TO IMR BUT IS TO BE DETERMINED BY THE WCAB BASED UPON SUBSTANTIAL MEDICAL EVIDENCE, WITH THE EMPLOYEE HAVING THE BURDEN OF PROVING THE TREATMENT IS REASONABLY REQUIRED.

1.

As discussed above, the purpose of IMR is to review a "utilization review decision." (Lab. Code, §§ 4610.5(a)(1), (a)(2), (c)(1), (c)(2), (d), (e).) Accordingly, if there is no legally valid UR decision, either because the UR decision is untimely or suffers from material procedural defects, there is no basis for IMR. As applicant argues, IMR presupposes a valid UR determination.

2.

Where there is no valid UR decision subject to IMR, the issue of medical necessity must be determined by the WCAB. (Lab. Code, §§ 4604 ("[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, … *except as otherwise provided by Section 4610.5*" (italics added)); 5300 (providing that "except as otherwise provided in Division 4," the WCAB has exclusive initial jurisdiction over claims "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto").)

3.

Rule 10451.2(c)(1)(C) provides that if an employee prevails in an assertion that the defendant's UR was untimely or procedurally deficient, "the employee … still has the burden of showing entitlement to the recommended treatment … ." The basis for this provision is as follows.

An injured employee is only entitled to medical treatment that is reasonably required to cure or relieve the industrial injury (Lab. Code, § 4600(a)) and it is the employee's burden to establish his or her entitlement. (Lab. Code, §§ 3202.5, 5705.)

As previously observed, *Sandhagen* held that if a defendant fails to meet the UR timelines of section 4610, it may not use the procedures of section 4062 to object to the recommended treatment. Nevertheless, *Sandhagen* affirmed that, if a defendant's UR is untimely or otherwise procedurally defective, the employee still bears the burden of proving that the recommended treatment is reasonably

necessary:

> "The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Stats. 2004, ch. 34, § 9.) Accordingly, *notwithstanding whatever an employer does* (***or does not do***), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5)."
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> (*Sandhagen*, 44 Cal.4th at p. 242 [italics, underlining, and bolding added].)

D.

IF THERE IS A TIMELY AND VALID UR, THE ISSUE OF MEDICAL NECESSITY SHALL BE RESOLVED THROUGH THE IMR PROCESS IF REQUESTED BY THE EMPLOYEE.

As discussed above, a defendant's UR decision will be deemed invalid only if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Also, there is a clear legislative intention that medical necessity disputes be resolved through the IMR process, and not by the WCAB. Therefore, if the WCAB determines that a defendant's UR decision was timely and suffered only from minor technical or immaterial defects, any challenge to the UR decision must be resolved through the IMR process. (Lab. Code, §§ 4610(g)(3)(A) ("disputes [regarding the UR decision] *shall be resolved pursuant to Section 4610.5*, if applicable" [italics added]); 4610.5(e) "[a] utilization review decision may be reviewed or appealed *only by independent medical review* pursuant to this section" [italics added].)

In light of this, if an employee intends to challenge the timeliness or procedural validity of a UR decision before the WCAB, a prudent employee will also file a timely request for IMR. If the employee elects not to file a timely request for IMR, the employee does so at his or her peril, i.e., the employee might have no remedy if the WCAB finds the employer's UR decision was timely and procedurally valid.

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IV. APPLICATION OF THESE PRINCIPLES TO THIS CASE

Section 4610 contemplates that in making a UR decision the UR physician will review all "information" that is "reasonably necessary" to the decision and will not rely on "incomplete or insufficient information." (Lab. Code, § 4610(d), (g)(1), (g)(2), (g)(4), (g)(5).) Furthermore, the statutory scheme contemplates that the AD will adopt Rules regarding UR procedures. (Lab. Code, §§ 4610(c), (g)(3)(A), (i), 4603.5.) Among the Rules the AD has adopted is that a UR physician's "written decision … shall contain … [a] list of all medical records reviewed." (Cal. Code Regs., tit. 8, §§ 9792.9(l)(3) [applicable to UR decisions issued prior to 7/1/13 for injuries occurring prior to 1/1/13], 9792.9.1(e)(5)(D) [applicable to injuries occurring on or after 1/1/13 and to UR decisions issued on or after 7/1/13, regardless of date of injury].)

The provisions that the UR physician will consider all reasonably necessary medical information in making a UR determination, and will list all medical records reviewed, are consonant with the long-standing principles that "[a] medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises" (*Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358]) and that "[m]edical reports and opinions are not substantial evidence if they are … based … on inadequate medical histories" (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; see, also, e.g., *People v. Jones* (2013) 57 Cal.4th 899, 951 ("Like a house built on sand, [an] expert's opinion is no better than the facts on which it is based." (Internal quotation marks omitted).

Here, as noted by the WCJ in her Report, there is a wealth of medical records. However, defendant provided UR physicians deGrange and Deitel only with Dr. Simpkins's July 1, 2013 report, the June 8, 2011 lumbosacral MRI, and "18 additional pages of medical records," which were not identified as required by AD Rule 9792.9.1(e)(5)(D). Both UR physicians acknowledged that applicant has both subjective and objective evidence of radiculopathy which the proposed spinal surgery was intended to address. However, both denied the requested surgery finding that there was no imaging reflecting nerve root compression, moderate or greater central canal stenosis, lateral recess stenosis, or neural foraminal stenosis at the L4-S1 levels and because there was no evidence that conservative treatment had failed.

These conclusions are inconsistent with the medical file and suggest that Drs. deGrange and Deitel were not provided with or did not review:

(1) the reports of applicant's primary treating physician Dr. Brown and AME Dr. Rottermann, which detail the multiple modalities of conservative treatment including epidural injections, medications, a back brace, physical therapy and home exercise that were tried but failed to resolve applicant's constant pain, numbness and tingling in the bilateral lower extremities, sleeping problems, anxiety, high blood pressure, and other problems;

(2) the reports of applicant's consulting orthopedic surgeon Dr. Simpkins and AME Rottermann discussing EMG/NCV studies, x-rays and an MRI that had been performed and showed multiple disc protrusions with associated neural foraminal encroachment, disc disease with severe narrowing at L5-S1 and herniated discs at several levels with radiculopathy; or

(3) the discogram report of Dr. Lowenstein, finding that applicant was positive for concordant discogenic pain at L4-5 and L5-S1.

We conclude that defendant's failure to provide the above reports to Drs. deGrange and Deitel or, if provided, their failure to review and/or discuss them is a material defect that undermines the integrity of the UR decisions because it caused the decisions to rest upon an inadequate medical record and, therefore, rendered them legally insubstantial. (See *Hegglin*, *supra*, 4 Cal.3d at p. 169; *Zemke*, *supra*, 68 Cal.2d at p. 798.) As stated in *J.C. Penney Co. v. Workers' Comp. Appeals Bd.* (*Edwards*) (2009) 175 Cal.App.4th 818, 828 [74 Cal.Comp.Cases 826]:

> "The full disclosure of medical reports as required by … rules is essential to the expeditious determination of the controversies submitted to the appeals board and failure to disclose is prejudicial to the injured worker. This prejudice is, inter alia, that [the failure to fully disclose medical reports may] prevent the worker's doctor from recommending further medical or surgical procedures."

Consequently, defendant's UR is legally invalid, there is no basis for IMR, and, therefore, the issue of whether applicant's recommended spinal surgery is medically necessary must be resolved by the

WCAB. We will not now decide that question, however, but will return it to the WCJ to determine in the first instance.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the September 23, 2013 Findings and Order is **RESCINDED** and this matter is **RETURNED** to the workers' compensation administrative law judge for further proceedings

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and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, California

2/27/2014

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

JOSE DUBON
MAURICE ABARR
STATE COMPENSATION INSURANCE FUND

NPS:abs/jmp