WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN GONZALEZ, *Applicant*

vs.

DOWNEY CONSTRUCTION; OLD REPUBLIC CONTRACTORS INSURANCE GROUP, Administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ12516127
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Defendant contends that the WCJ erred in strictly construing Labor Code[1] section 4610(k), arguing that the clear purpose and intent of section 4610(k) is to prevent overburdening the claims administration of benefits and to prevent an abuse the utilization review (UR) system by repeated requests for the same treatment.

Section 4610 provides that:

> A utilization review decision to modify or deny a treatment recommendation shall remain effective for 12 months from the date of the decision without further action by the employer ***with regard to a further recommendation by the same physician, or another physician within the requesting physician's practice group***, for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.
> (Lab. Code, § 4610(k) emphasis added.)

[1] All further statutory references are to the Labor Code, unless otherwise noted.

While defendant admits that Jean-Jacques Abitbol, M.D., and Clark Smith M.D., are not in the same practice (Petition for Reconsideration, at p. 6:19-20), defendant argues that, because Dr. Abitbol and Dr. Smith submitted Requests for Authorizations (RFAs) for the same treatment (a pre-surgical consult for an Intrathecal Pump) that the August 22, 2021 UR non-certification of Dr. Smith's RFA remained in effect thereby making it unnecessary for defendant to submit Dr. Abitbol's September 3, 2021 RFA to UR as well.

Nevertheless, section 4610(k) limits the 12-month period of effectiveness of a UR decision only "with regard to a further recommendation by the ***same physician***, ***or another physician within the requesting physician's practice group…***" (Lab. Code, § 4610(k) emphasis added.) Moreover, where statutory language in unambiguous, we are bound by the plain meaning of the statute. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 888.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 28, 2022

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

JUAN GONZALEZ
HIDEN ROTT OERTLE, LLP
KARLIN, HIURA & LA SOTA, LLP

PAG/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

FACTS

Defendant filed a timely Petition For Reconsideration, seeking reconsideration from the Findings and Award of this court dated 11/4/2021. The Findings and Award issued following an expedited trial on 9/29/2021. At trial, the parties stipulated in part to the following facts pertinent on Reconsideration:

1. Juan Gonzalez, born [], while employed on June 3, 2019, as a Pipe Layer, Occupational Group Number 480, at Corona, California, sustained injury arising out of and in the course of employment to the pelvis, femoral artery, and abdomen. The primary treating physician is Dr. Jean-Jacques Abitbol, M.D.

The issues submitted for decision were:

1. Did defendant perform an untimely Utilization Review of Dr. Abitbol's September 3, 2021 Request for Authorization?

2. Given the UR non-certification of Dr. Clark Smith's Request For Authorization dated 8/22/2021 seeking authorization for a pre-surgical consult for an Intrathecal Pump, is Defendant obligated to submit the 9/3/2021 RFA of Dr. Abitbol for the same consult to UR in the absence of any change in the applicant's condition?

Dr. Abitbol's 9/3/2021 Request for Authorization seeks an "Intrathecal Pump Pre-surgical Consultation" and "Zolgensma" medication. (Exhibit 10, PR-2 dated 9/3/2021 with associated documents, Dr. Jean-Jacques Abitbol, MD). Petitioner seeks redress only from that portion of this court's decision pertaining to the intrathecal pump pre-surgical consultation.

In the Petition For Reconsideration, defendant describes this injured worker as having "…sustained crush injuries to his pelvis, an abdominal hernia, an occlusion of external iliac artery, and an anterior and posterior compression-type injury to the left pubic rami…hospitalized for 10 days and underwent open reduction and internal fixation of the displaced left pelvic fracture and bypass of the femoral artery due to the occlusion…" (Petition For Reconsideration 11/29/2021, page 2:22-27.) Petitioner notes the "…orthopedic AME found applicant is wheelchair dependent because 'he is unable to place any weight whatsoever primarily on the left lower extremity due to persistent pain and weakness'"…" (Petition For Reconsideration 11/29/2021, page 4:1-3.)

PETITIONERS' CONTENTIONS ON RECONSIDERATION

1. Petitioner contends that the Judge determined an issue that was not before the Appeals Board. In support of that contention, Petitioner speaks to a subsequent RFA issued by a different physician, Tomar Anbar, Ph.D. on 3/30/21 for an intrathecal pump (Exhibit N) which was non-certified on 4/5/2021 (Exhibit M).

This court found Dr. Abitbol's 9/3/2021 Request for Authorization for a pre-surgical consult should be treated as a request for expedited review. This court determined that the UR determination in response to Dr. Abitbol's 9/3/2021 RFA was untimely. Having so found, the court turned to the evidence submitted by the parties, to determine the reasonableness and necessity of a pre-surgical consult to cure or relieve from the effects of the injuries suffered by this injured worker.

As relates to the reasonableness and necessity of an Intrathecal Pump Pre-Surgical Consultation, Dr. Abitbol opined: "…On January 4, 2021, Dr. Arash Yaghjjoobian, M.D., of Medinsights, the UR services company certified an Intrathecal Pump trial, as an 'end-stage treatment alternative' due to the failure of at least 6 months of less invasive, ineffective and failed pain management methods. Despite this certification, the carrier has refused to authorize a "Pre-Op" Consultation, which has resulted in Mr. Gonzalez' inability to obtain effective pain relief. Pre-Op is the time before surgery, where a surgeon will meet with his or her patient; perhaps request surgical clearance from a mental health care provider, or a cardiologist, if indicated to ensure any underlying health conditions the patient may have will not cause problems during surgery. This Pre-Op consultation is necessary so that your surgical team can gather as much information as they can to provide the best surgical results. The Pre-Op consultation may also include the anesthesiologist; an endocrinologist if the patient has diabetes. In Mr. Gonzalez' case, he is taking blood thinners, and will be on them for the foreseeable future; he has also been diagnosed with Diabetes (DM II); and has been diagnosed with OSP (obstructive sleep apnea). Based on these medical conditions, no physician will perform surgery on Mr. Gonzalez without performing a Pre-Op Consultation…" (Exhibit 10, third-fourth pages of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21, pages unnumbered.)

Having found the UR response to Dr. Abitbol's 9/3/2021 RFA untimely, the court relied upon substantial medical evidence, and determined a pre-surgical consult to be reasonable and necessary to cure or relieve from the effects of applicant's injury. There was no preponderating evidence submitted by defendant, suggesting to the court that a pre-surgical consult was either unnecessary or unreasonable.

In direct response to Petitioner's first contention on Reconsideration, this court did not make a Finding that an intrathecal pump should be or has been ordered. To the contrary, this court issued its Finding that a pre-surgical consult prior to surgical introduction of an Intrathecal Pump is reasonably required to cure or relieve this injured worker from the effects of his injury. This court ordered a pre-surgical consult, not an intrathecal pump. Presumably, the result of that consult will either be a recommendation for or against introduction of an intrathecal pump. When and if that recommendation issues, the parties are aware of their rights and responsibilities.

2. Petitioner contends on Reconsideration that RFAs for the same treatment have been issued by different medical providers. Defendants contend that the legislature could not have intended to preclude only RFAs for the same treatment by the same physician or another physician in their same practice. Defendants contend that the legislature

must actually have meant to preclude RFAs for the same treatment rendered by any physician.

The issue placed before the trial court was: Given the UR non-certification of Dr. Clark Smith's Request For Authorization dated 8/22/2021, seeking authorization for a pre-surgical consult for an Intrathecal Pump, is Defendant obligated to submit the 9/3/2021 RFA of Dr. Abitbol for the same consult to UR in the absence of any change in the applicant's condition?

Exhibit K is a Notice of Review Outcome dated 9/1/2021 pertaining to a Request For Authorization of Dr. Clark Smith, MD received 8/22/2021 for multiple items including a "Pre-Surgical Consultation Intrathecal Pump Implantation." The recommendation of UR is for non-certification.

Exhibit 10, which is the RFA from Dr. Abitbol requests a pre-surgical consultation for an intrathecal pump pre-surgical consult. It appears to the court to be a recommendation for the same treatment that earlier had been recommended by Dr. Smith and denied by Utilization Review.

The plain language of Labor Code section 4610 (k) refers to a "…further recommendation by the same physician or another physician within the requesting physician's practice group, for the same treatment…" The recommendation by Dr. Smith and the recommendation by Dr. Abitbol is not by the "same physician."

Petitioner "…acknowledges Drs. Abitbol and Smith are not within the same practice. (Petition For Reconsideration 11/29/2021, page 5:19-20.) The WCJ concluded there to have been no evidence before the court that Dr. Abitbol and Dr. Smith are physicians within the same practice group sufficient to trigger a 12-month moratorium on submission of the same request.

Based upon the plain language of the statute, this court concluded that the previous submission by Dr. Smith of an RFA for a pre-surgical consult for an intrathecal pump does not preclude a different physician who is not in Dr. Smith's practice group from submitting an RFA for the same pre-surgical consult. This court concluded that Defendant was obliged to conduct utilization review for the same recommended consult, given the facts of this case, even in the absence of some evidence of a change in applicant's condition. Specifically, the court found that Defendant is obligated to conduct utilization review in connection with the 9/3/2021 Request For Authorization of Dr. Abitbol, even given defendant's prior Utilization Review of Dr. Clark's 8/22/2021 RFA for the same treatment, even in the absence of any change in the applicant's medical condition.

3. Petitioner contends that the 9/3/2021 RFA of Dr. Abitbol (Exhibit L) does not meet the criteria for expedited review, and thus the timeframe for normal review must apply.

In its Petition For Reconsideration, defendant notes that Dr. Abitbol "…faxed an 'Expedited Review' RFA for the same Pre-Surgical Consult on Friday, 9/3/2021, at 3:16 p.m. before the 3-day Labor Day weekend…" The significance of Petitioner's emphasis upon the intervention of the holiday is uncertain, other than perhaps as a nuanced explanation for a determination outside the 72-hour timeframe.

At trial, the parties submitted the issue of whether Dr. Abitbol's 9/3/2021 Request for Authorization for a pre-surgical consult should be treated as a request for expedited or non-expedited review. (Exhibit 10, PR-2 dated 9/3/2021 with associated RFA documents, Dr. Jean-Jacques Abitbol, MD).

Defendants contend on Reconsideration that the Request For Authorization of Dr. Abitbol dated 9/3/2021 (Exhibit 10) is not reasonably supported by evidence establishing that the injured worker faces an imminent and serious threat to his health or that the timeframe for utilization review under subdivision (c) (3) would be detrimental to the injured workers' condition. As a consequence, defendants contend, the request for utilization review "shall" be reviewed by the claims administrator under the timeframe set forth in subdivision (c) (3) for normal review.

Exhibit 10 is a 10-page document which includes a Request For Authorization dated 9/3/2021 requesting an Intrathecal Pump Pre-surgical Consultation. Exhibit 10 includes a facsimile confirmation noting transmittal on 9/3/21 at 3:16 p.m. Included in the transmittal is an 8/24/2021 "Primary Treating Physician's Report Request For Authorization on an Expedited Review Basis." (Exhibit 10, EAMS).

The Request for Authorization component of Exhibit 10 contains a check mark in the box next to the verbiage "Expedited Review: Check box if employee faces an imminent and serious threat to his or her health." Under "Diagnosis" the RFA notes "low back pain" and "Please review 8/24/21 report for Dx".

The 8/24/21 report component of Exhibit 10 under the heading "Diagnosis" reflects low back pain post crush injury, pelvic bone piercing screw into the pelvic floor confirmed by MRI, pelvic bone screws loosening confirmed by XR, pelvic girdle atrophy confirmed by MRI, LSP causing paralysis per Dr. Schweller, severe altered gait causing wheelchair dependency-per Dr. Bernicker, cognitive dysfunction with memory loss, dizziness, lightheadedness, poor balance, and mood changes secondary to probably anoxic injured and blurred vision-Per Dr. Schweller, permanent mental incapacity on a Neuropsychological basis – Per Dr. Whitehead, Depressive disorder, anxiety disorder, chronic pain syndrome, r/o PTSD-Per Dr. Tilley.

The 8/24/21 report component of Exhibit 10 (under the heading "Discussion Re: Expedited Review" notes: "…Mr. Gonzalez' condition is one in which he faces an imminent and serious threat to his health to include the potential loss of life or limb, or other major bodily function, as cogently stated by the AME in his recent reporting that 'If the patient were to fall and land on his left hip, he is at great risk for penetration of the lumbosacral plexus from the sacroiliac screw which would result in dire consequences. Appropriately, the normal timeframe for the decision making process would be detrimental to this employee's life and health.'"

Exhibit I are Case Entry Notes from GBCARE. This exhibit acknowledges fax documentation of 9/7/21 at 4:42 PM. The notes related to that entry read: "UR Assignment Medinsights has received a Initial Prospective UR for RUSH intrathecal pump pre-surgical consultation; RUSH…ordered by Jean Jacques Abitbol, MD on 09/07/2021…" In all capitalized letters, the notation describes the request as a "RUSH" request. In that same Exhibit I, a later entry dated 9/13/21 reflects: "Per

RF, there is AA on file Added G89.4 Chronic Pain Syndrome, obtained from medicals Expedite request found in RFA, edited reviewer level in RS…"

Exhibit H is a Medinsights Notice of Review Outcome dated 9/14/21 referring to an RFA of Dr. Abitbol first received by Medinsights 9/7/21. It notes "Requested Treatment/Service" which includes an Intrathecal pump pre-surgical consultation.

The evidence submitted to this court, and entered without objection, compels the conclusion that the 9/3/21 transmittal (Exhibit 10) identified itself as a request for expedited review, and contained a detailed designation of the reasons for expedited review. GB Care received the RFA, but between at least 9/7/21 and 9/13/21 failed to assign to the RFA a level of review consistent with its "RUSH" expedited status. By 9/13/21, the 72-hour period for review had already expired. The 72-hour timeframe would apply, but was not met. The Utilization review determination was not timely.

The Utilization review being untimely, the WCAB has jurisdiction over the medical treatment issue.

4. Petitioner contends that the Board should grant Reconsideration based upon the "newly-discovered" Panel QME report of Dr. Vincent Fortanasce dated 10/14/2021 (attached to its Petition For Reconsideration) which issued after the occurrence of the Expedited Hearing.

Petitioner attaches to its petition the 10/14/2021 medical narrative report of Dr. Fortanasce. At page 33 of that report, Dr. Fortanasce notes his "Impression": 1) Industrial crush injury; 2) Unstable pelvic fracture; 3) Status-post laparotomy and abdominal closure and ventral hernia repair; 4) Status-post left femoral arterial bypass; 5) Pelvic internal fixation device; 6) Status-post removal and reapplication of external fixation device with closed reduction and percutaneous pinning of the bilateral sacroiliac joints; 7) Post-traumatic stress disorder, depression, anxiety; 8) Mild cognitive difficulties on current clinical exam; 8) Cervical and lumbar spine pain, defer to orthopedic surgery. Dr. Fortanasce goes on to determine there to be no evidence of paraplegia, spinal cord injury, or spinal muscular atrophy. This finding would seem to be consistent with the finding of the AME noted in the Petition For Reconsideration: "The orthopedic AME found applicant is wheelchair dependent because 'he is unable to place any [weight] whatsoever primarily on the left lower extremity due to persistent pain and weakness'" (Petition For Reconsideration 11/29/2021, page 4:1-3.)

The newly-discovered evidence submitted by petitioner speaks to cervical and lumbar pain. The recommendation of Dr. Abitbol for intrathecal pump pre-surgical consult is to explore options for pain management.

This court ordered a pre-surgical consult. The physician conducting that consult will undoubtedly have benefit of the medical reporting of Dr. Fortanasce, in formulating findings and opinions. This court does not believe, given the medical treatment ordered, that the alleged newly-discovered evidence warrants reconsideration.

RECOMMENDATION

It is respectfully recommended that the Petition For Reconsideration be denied.

DATE: December 7, 2021

Nate Halprin
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

The parties proceeded to trial on 9/29/2021. The parties were provided a period of time until 12:00 noon on October 8, 2021 in which to submit post-trial briefs, and on October 8, 2021 the matter stood submitted for decision.

The parties stipulated in part to the following facts:

1. Juan Gonzalez, born [], while employed on June 3, 2019, as a Pipe Layer, Occupational Group Number 480, at Corona, California, sustained injury arising out of and in the course of employment to the pelvis, femoral artery, and abdomen. At the time of injury, the employer's workers' compensation carrier was Old Republic Contractors Insurance Group, administered by Gallagher Bassett Services, Inc.

2. The primary treating physician is Dr. Jean-Jacques Abitbol, M.D.

The issues submitted for decision were:

1. Did defendant perform an untimely Utilization Review of Dr. Abitbol's September 3, 2021 Request for Authorization?

2. Given the UR non-certification of Dr. Clark Smith's Request For Authorization dated 8/22/2021, seeking authorization for a pre-surgical consult for an Intrathecal Pump, is Defendant obligated to submit the 9/3/2021 RFA of Dr. Abitbol for the same consult to UR in the absence of any change in the applicant's condition?

The parties on a prior occasion proceeded to Expedited Hearing (Trial) 8/17/21 on different issues, with Findings and Opinion dated 9/2/2021 issuing in connection with that prior trial. At the prior 9/2/2021 trial, nine trial exhibits on behalf of applicant (Exhibits 1-9) and seven exhibits on behalf of defendants (Exhibits A-G) were marked and entered into evidence.

At trial on issues presently before the court, applicant offered three additional proposed exhibits (inadvertently mis-marked at trial as Exhibits 1, 2 and 3). The three were entered into evidence without objection, and each is now correctly re-numbered in EAMS as Exhibits 10, 11 and 12. Defendant offered seven proposed exhibits (inadvertently mis-marked at trial as exhibits A-G); all were entered into evidence without objection and each is now correctly re-lettered in EAMS as exhibits H through N).

DISCUSSION

DID DEFENDANT PERFORM AN UNTIMELY UTILIZATION REVIEW OF DR. ABITBOL'S 9/3/2021 REQUEST FOR AUTHORIZATION?

Dr. Abitbol's 9/3/2021 Request for Authorization seeks authorization for "Intrathecal Pump Pre-surgical Consultation" and for "Zolgensma" medication (Exhibit 10, PR-2 dated 9/3/2021 with associated documents, Dr. Jean-Jacques Abitbol, MD). The parties contest whether or not these were requests for expedited utilization review.

Defendants contend in their trial brief that "…the RFA was issued on September 3, 2021 at 3:16 p.m., the Friday before the 3-day-Labor Day Holiday. The RFA was communicated by the Claims Administrator to Utilization Review on Tuesday, September 7, 2021; the first work day following the Labor Day Holiday…In the instant case, 4 efforts were made as documented on the UR Log and Notes… to communicate with Dr. Abitbol in the 5-working-day-period without success triggering the 14 day timeframe for normal review per Labor Code section 4610 (i) (1) Following the failed attempts to confer with Dr. Abitbol, the UR determination was timely issued on Monday, September 13, 2021 to non-certify the pre-surgical consult and prescriptive Zolgensma for the reasons set forth infra…" (Defendant's Points and Authorities dated 10/7/2021, page 2:2-18, EAMS Doc ID # 38541352.)

Defendants argue that the Request For Authorization of Dr. Abitbol dated 9/3/2021 (Exhibit 10) is not reasonably supported by evidence establishing that the injured worker faces an imminent and serious threat to his health or that the timeframe for utilization review under subdivision (c) (3) would be detrimental to the injured workers' condition. As a consequence, defendants contend, the request for utilization review "shall" be reviewed by the claims administrator under the timeframe set forth in subdivision (c) (3) or the normal review timeframe. …" (Defendant's Points and Authorities dated 10/7/2021, page 3:18-4:18, EAMS Doc ID # 38541352.)

A request for prospective or concurrent utilization review is to be made within 5 normal business days from receipt of a request for authorization. (California Labor Code Section 4610 (i)(1)). However, if "…the employee's condition is one in which the employee faces an imminent and serious threat to the employee's health, including, but not limited to, the potential loss of life, limb, or other bodily function, or the normal timeframe for the decision making process… would be detrimental to the employee's life or health or could jeopardize the employee's ability to regain maximum function, decisions to approved, modify, or deny requests by physicians prior to, or concurrent with, the provision of medical treatment services to employees shall be made in a timely fashion that is appropriate for the nature of the employee's condition, but not to exceed 72 hours after the receipt of the information reasonably necessary to make the determination…" (California Labor Code Section 4610 ((i)(3).)

Exhibit 10 is a 10-page document which includes: A Request For Authorization dated 9/3/2021, requesting an Intrathecal Pump, Zolgensma, and a Field Case Manager; A facsimile Confirmation noting transmittal of 9-pages on 9/3/21 at 3:16 pm; and, an 8/24/2021 "Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis." (Exhibit 10, EAMS).

The Request For Authorization component of Exhibit 10 contains a check mark in the box next to the verbiage "Expedited Review: Check box if employee faces an imminent and serious threat to his or her health." Under "Diagnosis" the RFA notes "low back pain" and "Please review 8/24/21 report for Dx".

The 8/24/21 report component of Exhibit 10 under the heading "Diagnosis" reflects low back pain post crush injury, pelvic bone piercing screw into the pelvic floor confirmed by MRI, pelvic bone screws loosening confirmed by XR, pelvic girdle atrophy confirmed by MRI, LSP causing paralysis per Dr. Schweller, severe altered gait causing wheelchair dependency-per Dr. Bernicker, cognitive dysfunction with memory loss, dizziness, lightheadedness, poor balance, and mood changes secondary to probably anoxic injured and blurred vision-Per Dr. Schweller, permanent mental incapacity on a Neuropsychological basis – Per Dr. Whitehead, Depressive disorder, anxiety disorder, chronic pain syndrome, r/o PTSD-Per Dr. Tilley.

The 8/24/21 report component of Exhibit 10 (under the heading "Discussion Re: Expedited Review") notes: "…Mr.Gonzalez' condition is one in which he faces an imminent and serious threat to his health to include the potential loss of life or limb, or other major bodily function, as cogently stated by the AME in his recent reporting that 'If the patient were to fall and land on his left hip, he is at great risk for penetration of the lumbosacral plexus from the sacroiliac screw which would result in dire consequences. Appropriately, the normal timeframe for the decision making process would be detrimental to this employee's life and health.'"

Exhibit I are Case Entry Notes from GBCARE. This exhibit acknowledges fax documentation of 9/7/21 at 4:42 PM. The notes related to that entry read: "UR Assignment Medinsights has received a Initial Prospective UR for RUSH intrathecal pump pre-surgical consultation; RUSH Zolgensma; Field nurse case manager ordered by Jean Jacques Abitbol, MD on 09/07/2021…" In all capitalized letters, the notation describes the request as a "RUSH" request. In that same exhibit I, a later entry dated 9/13/21 reflects: "Per RF, there is AA on file Added G89.4 Chronic Pain Syndrome, obtained from medicals Expedite request found in RFA, edited reviewer level in RS…"

Exhibit H is a Medinsights Notice of Review Outcome dated 9/14/21 referring to an RFA of Dr. Abitbol first received by Medinsights 9/7/21. It notes "Requested Treatment/Service" consisting of Intrathecal Pump and Zolgensma. Exhibit H also makes reference to Dr. Abitbol's earlier RFA for a Field Nurse Case Manager, noting the request to have been "withdrawn." Exhibit H provides details of UR's rationale for non-certification of the Intrathecal Pump and of Zolgensma.

The evidence submitted and entered without objection compels the conclusion that the 9/3/21 transmittal (Exhibit 10) identified itself as a request for expedited review, and contained a designation of the reasons for expedited review. GB Care received the RFA, but between at least 9/7/21 and 9/13/21 failed to assign to the RFA a level of review consistent with its "RUSH" expedited status. By 9/13/21, the 72-hour period for review had already expired. The 72-hour timeframe would apply, but was not met. The Utilization review determination was not timely.

The Utilization review being untimely, the WCAB has jurisdiction over the medical treatment issue.

Applicant contends a right to Zolgensma medication.

The burden of proof rests with the party holding the affirmative of the issue. (California Labor Code section 5705). In that regard, applicant bears the burden of proof. "…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. 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 (section 460, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence. (section 4604.5.)…" (State Compensation Ins. Fund v. Workers' Compensation Appeals Bd., 73 Cal. Comp. Cases 981, 990, 2008 Cal. Wrk. Comp. LEXIS 241, *25-26, 44 Cal. 4th 230, 186 P.3d 535, 79 Cal. Rptr. 3d 171 (Cal. July 3, 2008).)

Treating physician Abitbol specifies that his recommendation for Zolgensma is not based upon its FDA-approved use, but rather for "off label" use. Dr. Abitbol notes "…Zolgensma is a gene therapy recently approved by the FDA to replace the function of the nonworking or missing gene that causes SMA…" (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).) Dr. Abitbol notes on that same page "…Mr. Gonzalez was not born with a genetic mutation that causes spinal muscular atrophy for which the FDA provided the manufacturer of this medication with approval…" (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

Dr. Abitbol notes that "…While Mr. Gonzalez was not born with a genetic mutation that causes spinal muscular atrophy for which the FDA provided the manufacturer of this medication with approval, he does however present with the same symptomotology of SMA Types 2 and 3 of the 4 primary phenotypes of SMA…" (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).) Specifically, "…he lacks the ability to stand on his own; and is unable to walk independently and uses a motorized wheelchair…" (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

Dr. Abitbol notes from a medical perspective that it is "…unlikely that this drug will cure Mr. Gonzalez' paralysis…" and notes from a legal perspective that "…Labor Code Section 4600 requires an insurance company and/or employer responsibility in providing any care that will cure or relieve an injured worker, such as Mr. Gonzalez from the effects of his industrial injury." (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

Dr. Abitbol summarizes his understanding of the controlling medical-legal standard under which he issues his recommendation for Zolgensma as follows:

> "…Put another way, if this FDA approved drug has any possibility of helping Mr. Gonzalez, which I believe to be the case, he is entitled to receive this medical benefit, as it is medically reasonable and necessary to his continued care…"

(Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

Summarizing Dr. Abitbol's medical conclusions: Zolgensma serves to replace the function of a nonworking or missing gene that causes SMA (spinal muscular atrophy). Mr. Gonzalez does not suffer from SMA nor does he suffer from a genetic mutation that causes muscular atrophy. Mr. Gonzalez has a diagnosis of lumbosacral plexus injuries (LSP), which is causing severe paralysis resulting from damage to his spinal cord due his involvement in a pelvic-crush injury. Applicant lacks the ability to stand on his own and is unable to walk independently, and uses a wheelchair. An individual suffering from SMA (which applicant does not suffer from) may have similar symptomotology. Zolgensma will not cure the applicant's condition; however, if Zolgensma has any possibility of helping the applicant he has a right to it.

The California Code of Regulations defines "medically necessary" and "medical necessity" as meaning medical treatment that is reasonably required to cure or relieve the injured employee of the effects of his or her injury and based on standards set forth in the medical treatment utilization schedule including the drug formulary. (Title 8, California Code of Regulations section 4610.5 (b)(2).)

Dr. Abitbol notes that "…the FDA allows for medication to be used in a manner not specified in the FDA's approved packaging label or insert, which is known as 'Off-label' use…" (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

C.C.R. section 9792.27.1 defines off-label use as "…use of a drug for a condition, or in a dosage or method of administration, not listed in the drug's FDA-approved labeling for approved use." (Title 8, California Code of Regulations section 9792.27.1(q).)

C.C.R. section 9792.27.5 directs that "…off-label use of a drug shall be in accordance with the MTUS Treatment Guidelines and rules and the MTUS Drug Formulary…" (Title 8, California Code of Regulations section 9792.27.5(a).) "…When a physician believes it is medically necessary to prescribe a drug for an off-label use not recommended by the MTUS Treatment Guidelines or not addressed by the MTUS Treatment Guidelines, the permissibility of the treatment outside of the guidelines is governed by section 9792.21 subdivision (d) (condition not addressed by MTUS or seeking to rebut the MTUS), section 9792.21.1 (medical evidence search sequence), section 9792.25 (quality and strength of evidence definitions) and section 9792.25.1 (MTUS Methodology for Evaluating Medical Evidence)…" (Title 8, California Code of Regulations section 9792.27.5(d).)

Dr. Abitbol notes "…Mr. Gonzalez has a diagnosis of lumbosacral plexus injuries (LSP), which is causing severe paralysis and has resulted from damage to his spinal cord due his involvement in a pelvic-crush injury…signals cannot travel to and from the lower regions of the body, and the body is prevented from sending signals back up the spinal cord to the brain…" (Exhibit 10, fifth page of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

The recommended guidelines set forth in the MTUS are presumptively correct on the issue of extent and scope of medical treatment, and is the standard for the provision of Labor Code section 4600 medical care. The MTUS recommended guidelines are presumptively correct on the issue of extent and scope of medical treatment. (Title 8, California Code of Regulations section 9792.21 (c).)

The recommendation provided by Dr. Abitbol in his medical report/RFA (exhibit 10) for Zolgensma do not include citations or reference(s) to the MTUS and/or ACOEM Guides. He refers to having reviewed "clinical trials" and an AveXis clinic study on Zolgensma, but did not provide a copy of or citation to the trials or study to which he referred. Dr. Abitbol did not specify or cite to any studies or trials as being peer reviewed medical studies. Dr. Abitbol's report/RFA (Exhibit 10) does not reflect that he used the Medical Evidence Search Sequence protocols for the evaluation and treatment of injured workers required under Title 8, California Code of Regulations section 9792.21.1. The Request For Authorization DWC Form RFA (Exhibit 10) provides an ICD-Code for the Intrathecal Pump Pre-surgical Consultation; however, the doctor provides no ICD-Code for Zolgensma. ICD-10 coding is required on or after 10/1/2015. (Title 8, California Code of Regulations, section 9785 (f)(8).) Dr. Abitbol seems to substitute his "any chance" of helping standard in place of "reasonable medical probability" in support of his request for Zolgensma. For each and all of the reasons noted, the report of Dr. Abitbol is not substantial medical evidence on the issue of the reasonableness and necessity of Zolgensma. The court finds that applicant has failed to sustain his burden of proof that Zolgensma is reasonably required to cure or relieve from the effects of his injury.

As relates to the reasonableness and necessity of an Intrathecal Pump Pre-Surgical Consultation, Dr. Abitbol offers the following: "…On January 4, 2021, Dr. Arash Yaghjjoobian, M.D., of Medinsights, the UR services company certified an Intrathecal Pump trial, as an 'end-stage treatment alternative' due to the failure of at least 6 months of less invasive, ineffective and failed pain management methods. Despite this certification, the carrier has refused to authorize a "Pre-Op" Consultation, which has resulted in Mr. Gonzalez' inability to obtain effective pain relief. Pre-Op is the time before surgery, where a surgeon will meet with his or her patient; perhaps request surgical clearance from a mental health care provider, or a cardiologist, if indicated to ensure any underlying health conditions the patient may have will not cause problems during surgery. This Pre-Op consultation is necessary so that your surgical team can gather as much information as they can to provide the best surgical results. The Pre-Op consultation may also include the anesthesiologist; an endocrinologist if the patient has diabetes. In Mr. Gonzalez' case, he is taking blood thinners, and will be on them for the foreseeable future; he has also been diagnosed with Diabetes (DM II); and has been diagnosed with OSP (obstructive sleep apnea). Based on these medical conditions, no physician will perform surgery on Mr. Gonzalez without performing a Pre-Op Consultation…" (Exhibit 10, third-fourth pages of the report entitled Primary Treating Physician's Report Request For Authorization On An Expedited Review Basis 8/24/21 (pages unnumbered).)

From the evidence before the court, the court concludes that an Intrathecal Pump trial has been UR-approved. Given Dr. Abitbol's narrative, including his general references to peer reviewed studies, the court finds that applicant has sustained his burden of proving a pre-surgical consult prior to surgical introduction of an Intrathecal Pump is reasonably required to cure or relieve this injured worker from the effects of his injury.

GIVEN THE UTILIZATION REVIEW NONCERTIFICATION OF DR. CLARK SMITH'S RFA DATED 8/22/21, SEEKING AUTHORIZATION FOR A PRESURGICAL CONSULT FOR AN INTRATHECAL PUMP, IS DEFENDANT OBLIGATED TO SUBMIT THE 9/3/21 RFA OF DR. ABITBOL FOR THE SAME CONSULT TO UR IN THE ABSENCE OF ANY CHANGE IN THE APPLICANT'S MEDICAL CONDITION?

California Labor Code section 4610 (k) provides in pertinent part: "…A utilization review decision to modify or deny a treatment recommendation shall remain effective for 12 months from the date of the decision without further action by the employer with regard to a further recommendation by the same physician, or another physician within the requesting physician's practice group, for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision…" (California Labor Code section 4610(k).)

Exhibit K is a Notice of Review Outcome dated 9/1/2021 pertaining to a Request For Authorization of Dr. Clark Smith, MD received 8/22/2021 for multiple items including a "Pre-Surgical Consultation Intrathecal Pump Implantation." The recommendation of UR is for non-certification.

Exhibit 10, which is the RFA from Dr. Abitbol, likewise requests a pre-surgical consultation for an intrathecal pump. It appears to the court to be a recommendation for the same treatment that earlier had been recommended by Dr. Smith and denied by Utilization Review.

The plain language of Labor Code section 4610 (k) refers to a "…further recommendation by the same physician or another physician within the requesting physician's practice group, for the same treatment…" The recommendation by Dr. Smith and the recommendation by Dr. Abitbol is not by the "same physician."

Exhibit N (Request For Authorization dated 3/30/21 authored by Dr. Smith) contains an extensive list of 16 physicians' names next to "boxes" that can for convenience be checked, to indicate the submitting doctor. Dr. Abitbol's name does not appear among those physicians noted.

There is no evidence before the court that Dr. Abitbol and Dr. Smith are physicians within the same practice group sufficient to trigger a 12-month moratorium on submission of the same request.

Defendant is obligated to conduct utilization review consistent with its established utilization review process. (California Labor Code section 4610.) The previous submission by Dr. Smith of an RFA for a pre-surgical consult for an intrathecal pump does not preclude a different physician who is not in Dr. Smith's practice group from submitting an RFA for the same pre-surgical consult. Nor does California Labor Code section 4610 (k) sanitize Defendant from its obligation to conduct utilization review for the same recommended consult given the facts of this case, even in the absence of some evidence of a change in applicant's condition.

The court finds that Defendant is obligated to conduct utilization review in connection with the 9/3/2021 Request For Authorization of Dr. Abitbol, even given defendant's prior Utilization Review of Dr. Clark's 8/22/2021 RFA for the same treatment, and even in the absence of any change in the applicant's medical condition.

DATE: 11/04/2021

Nate Halprin
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE