**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**MICHELE EARLEY, *Applicant***

**vs.**

**COX COMMUNICATIONS; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, administered by BROADSPIRE, *Defendants***

**Adjudication Number: ADJ4430885 (ANA 0324472)**
**Santa Ana District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 14, 2020. By the F&A, the WCJ found that applicant was entitled to reimbursement for medical mileage expenses for multiple dates and certain prescription medications. Applicant's entitlement to reimbursement for the other expenses in dispute was deferred pending development of the record.

Defendant contends that there is not substantial evidence to support that applicant is entitled to reimbursement for certain medications. Defendant also contends that there were no valid requests for authorization (RFAs) from applicant's physician, Dr. Grace Reid. Lastly, defendant contends that reimbursement for medical mileage expenses was not an issue at trial and the WCJ's award for these expenses violates its right to due process.

We received an answer from applicant. The WCJ issued a Report and Recommendation of Workers' Compensation Judge on Defendant's Petition for Reconsideration (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and issue a new decision finding that applicant is entitled to reimbursement for her prescriptions as recommended by Dr. Reid on June 20, 2019 and July 15, 2019. Our new decision will not retain the finding or award

for medical mileage expenses, but will retain the finding that entitlement to reimbursement for the other prescription expenses in dispute requires development of the record.

## FACTUAL BACKGROUND

Applicant sustained an injury to her neck and psyche from cumulative trauma through April 13, 1998 while employed as an administrative assistant by Cox Communications. The parties entered into Stipulations With Request for Award, wherein they stipulated that the injury caused 85% permanent disability and a need for medical treatment. (Applicant's Exhibit No. 2, Stipulations with Request for Award, March 23, 2011, p. 6.) The Award was approved on March 23, 2011.

Grace Reid, M.D. has provided psychiatric treatment to applicant for several years. She sees applicant once per month for medication management. (Applicant's Exhibit No. 7, Deposition transcript of Dr. Grace Reid, April 26, 2019, p. 7.) Dr. Reid submitted multiple RFAs and primary treating physician (PTP) progress reports from 2013 to 2019, as well as letters regarding applicant's psychiatric condition and treatment. Dr. Reid has testified that due to applicant's history of two previous psychiatric hospitalizations and two previous suicide attempts, she must be monitored on a "very frequent and regular basis for any decline in her mood symptoms and also for the efficacy of her current medication regimen." (*Id.* at p. 19.) She has further opined that applicant's "current medication regimen has actually prevented her from being hospitalized again for depression." (*Id.* at p. 20.)

A utilization review (UR) decision was issued on February 9, 2018 non-certifying the following medications recommended by Dr. Reid: Trazadone, Lorazepam, Wellbutrin, Cymbalta, Adderall and Abilify. (Defendant's Exhibit H, Broadspire utilization reviews, February 9, 2018, pp. 23-26.) The UR decision states that the RFA was received on February 2, 2018. (*Id.* at p. 23.) The UR decision was served on applicant, her attorney and Dr. Reid. (*Id.* at pp. 23 and 26.)

Applicant sought independent medical review (IMR) of the February 9, 2018 UR decision. (Defendant's Exhibit G, Determination of the Administrative Director, March 16, 2018.) The administrative director (AD) found that the UR decision was not eligible for review because the UR decision reported that additional information was requested from the treating physician, but was not provided. (*Id.*)

Dr. Reid issued RFAs and progress reports dated June 20, 2019 and July 15, 2019.[1] (Applicant's Exhibit No. 1, RFAs, PTP progress reports, and physician progress reports of Grace Reid, M. D., covering the period from 3/26/2013 through 11/26/2019, pp. 16-17, 21-25.) The June 20, 2019 RFA states the diagnosis as "Major Depressive Disorder, severe, recurrent, without psychotic features" and "Medication Management" is listed under "Service/Good Requested." (*Id.* at p. 22.) The CPT code is listed as 99214 and under "Other Information: (Frequency, Duration Quantity, etc.)" it states "once a month." (*Id.*) Included with this RFA was a letter from Dr. Reid of the same date stating in pertinent part:

> Mrs. Michele Earley has been under my psychiatric care since 2007. During the time period of May 2017 to December 2018, Ms. Earley has been compliant with her medical appointments and treatment regimen. Her diagnosis includes Major Depressive Disorder, severe, recurrent, without psychotic features. Her mood symptoms were initiated and exacerbated by a significant neck injury, sustained at her workplace in 1998. Previous treatments for her mood symptoms have included electroconvulsive therapy, psychotropics, and psychotherapy.
>
> Her current medications include: Cymbalta 120 mg each day, Wellbutrin XL 450 mg each day, Abilify 10 mg each day, lorazepam one mg twice a day as needed for anxiety, Adderall 30 mg twice a day, and trazodone 100 mg each bedtime. It is my strong medical opinion that in order to maintain the stability of Mrs. Earley's mood, her current medication regimen and regular follow up medication management appointments need to be continued. Discontinuing medications and medication management appointments with me would result in a decline in her psychiatric health.
>
> (*Id.* at p. 21.)

Dr. Reid's attached progress report states in handwriting under "Treatment Plan" the following: "Continue medications: Cymbalta 120 mg Qday, Wellbutrin XL 450 mg QAM, Abilify 10 mg Qday, Adderall 30 mg twice a day, Lorazepam one mg each day as needed for anxiety, Trazodone 100 mg each bedtime." (*Id.* at p. 24.)

On July 3, 2019, defendant issued a UR decision in response to Dr. Reid's June 20, 2019 RFA. The treatment requested was listed as "1 Medication Management 1x a month." (Defendant's Exhibit H, Broadspire utilization reviews, July 3, 2019, p. 1.) The "Determination"

[1] The record includes several other RFAs and progress reports from various dates. However, since we agree with the WCJ that further development of the record is necessary in order to address applicant's entitlement to reimbursement for the other disputed prescription expenses, we do not specifically outline the facts regarding the other treatment recommended in those RFAs and reports.

was:

> Recommend prospective request for 1 Medication Management six visits for one time a month for six months followed by an assessment of objective functional improvement between 7/1/2019 and 8/15/2019 be certified.
>
> (*Id.*)

It was further stated in the UR decision in relevant part:

> This request for medication management is supported; however, the length of time this management is requested is not stated. This patient has been followed by psychiatry and is on multiple psychiatric medications. These medications would require regular assessment regarding their efficacy as well as medication refills. However, as there is no request for the number of visits, this request is medically necessary for six visits for medication management one time a month for six months followed by an assessment of objective functional improvement.
>
> (*Id.* at p. 2.)

The UR decision was sent to applicant and a copy served on Dr. Reid and applicant's attorney. (*Id.* at pp. 1 and 3.) There is no UR decision in the record regarding the prescriptions that Dr. Reid had recommended on June 20, 2019.

Dr. Reid's July 15, 2019 RFA also gave the diagnosis of "Major Depressive Disorder, severe, recurrent, without psychotic features." (Defendant's Exhibit H, Broadspire utilization reviews, July 3, 2019, p. 16.) The attached progress report stated the following under "Subjective complaints"

> Pt states, "my mood is low."
> Pt's mood is depressed & anxious with tearfulness, low energy, low concentration, decreased social interactions, nausea & decreased appetite.
>
> (*Id.*)

The progress report had the same diagnosis as reported in the RFA and provided objective findings:

> Mental status exam: fair eye contact, appropriately groomed, psychomotor retardation, special devised volume & rate, (unreadable), latency of speech, linear though process, constricted affect, mood depressed & anxious, psi/H2/Pat/UH" no delusions, good insights, judgement.
>
> (*Id.*)

The treatment plan in the report was the same as reflected in the June 20, 2019 progress report. (*Id.*) The record does not contain a UR decision in response to Dr. Reid's July 15, 2019 RFA and supporting documentation.

On July 23, 2019, applicant's attorney sent a letter to defendant requesting reimbursement for applicant's out-of-pocket expenses in the following amounts: $311.04 for prescriptions from 6/3/2019 to 6/29/19 and $220.40 for mileage from 5/21/19 to 6/24/19. (Applicant's Exhibit No. 8, Out-of-pocket submissions, dated 7/23/2019, pp. 1-11.) This included mileage to see Dr. Reid on June 20, 2019 and to see applicant's orthopedist, Dr. Michael Einbaud, on June 24, 2019. (*Id.* at p. 3.)

On August 21, 2019, defendant sent a letter to applicant objecting to her request for reimbursement for $311.04 for prescriptions. (Defendant's Exhibit I, Broadspire objection letter re pharmacy charges, August 21, 2019.) The letter stated that it was contesting the charges on the following basis:

> No indication what doctor prescribed medications. No request for medications and no review by UR. Payment denied.
>
> (*Id.* at p. 1.)

The matter proceeded to trial on February 26, 2020 with the issues identified as follows in the Minutes of Hearing and Summary of Evidence:

> 1. Liability for self-procured medical treatment regarding prescription drugs, which Applicant has received from 11/28/2017 through 7/23/2019.
>
> 2. Applicant asserts that the URs which she has received in connection with her prescription medications are defective and untimely.
>
> 3. Applicant asserts that the defendant has waived its right to object to the payment of her medical prescriptions.
>
> 4. Applicant asserts that she has a valid treatment plan in effect.
>
> 5. The defendant asserts that it may not be liable for Applicant's out-of- pocket prescription drug expenses, as prescribed by Dr. Reid, pursuant to CCR Sections 9792.6 and 9792.6.
>
> 6. Defendant questions whether Dr. Reid has issued proper requests for authorization.

7. All other issues are deferred.

(Minutes of Hearing and Summary of Evidence, February 26, 2020, pp. 2-3.)

Applicant testified at trial as follows in pertinent part:

> Applicant stated that she has been treating with Dr. Grace Reid since approximately 2007. After being hospitalized, the applicant started seeing Dr. Reid. Applicant generally sees Dr. Reid every 30 to 60 days.
>
> The applicant confirmed that she takes medications that have been prescribed by Dr. Reid. These medications have basically been the same medications for the past few years.
> …
> After 2017, the applicant confirmed that the defendant made arrangements through an entity called Matrix, which is the administrator. Matrix would provide Applicant with her medications, and the defendant would then pay Matrix. The applicant believes that the defendant stopped paying Matrix for her medications in December 2017.
>
> Applicant's counsel referenced Defense Exhibit A, containing a correspondence which indicates that the defendant stopped paying Matrix effectively 12/11/2017. The applicant thinks this is the last time the defendant paid for any of her prescriptive medications.
>
> After this, Applicant started paying for her own medications again. She has kept an accounting of her out-of-pocket medical prescription costs. She has prepared an out-of-pocket submissions record. She believes this accurately reflects the medications she has received and which relate to her psychiatric injury.
>
> Applicant has submitted these out-of-pocket submissions to the defendant for reimbursement, but to date, she has not received any reimbursement. These submissions cover the period from 3/20/2018 through 7/23/2019.
>
> The applicant stated that she did not receive a letter regarding why the defendant was no longer repaying for her medications. She never received a UR review, either.
>
> The applicant stated that according to her out-of-pocket submissions record, which is contained within Applicant's Exhibit 8, her out-of-pocket expenses amount to $19,905.76. This would be for the time frame relating to 3/20/2018 through 7/23/2019.
> …
> At this point in time, the applicant became tearful as she considered the possibility of losing her ability to receive psychiatric treatment from Dr. Reid.

> The applicant stated that she wanted to continue treating with Dr. Reid, since Dr. Reid has helped her so much. The applicant believes that because of Dr. Reid's treatment and because of her knowledge of the various medications the applicant needs, this has helped the applicant avoid being hospitalized.
>
> The applicant stated that prior to 2007, which was before she treated with Dr. Reid, she had been psychiatrically hospitalized on more than one occasion. Applicant believes that Dr. Reid has helped her so that she will not have to be hospitalized.
> …
> The applicant takes various medications as prescribed by Dr. Reid. They are Wellbutrin, Cymbalta, Abilify, Trazodone, and Lorazepam. She takes these medications as prescribed and as needed.
>
> The applicant stated that between 11/28/2017 and 7/23/2019, she believes that she has basically taken all of the above-identified medications.
> …
> The applicant stated that she is presently seeing Dr. Reid once every three to four weeks. Dr. Reid provides her with medication management. Each appointment is about 20 minutes in length. They discuss the applicant's medications and prescriptions. Dr. Reid asks her how she is feeling.
>
> (*Id.* at pp. 5-8.)

Subsequent to the trial, the WCJ issued an Order Submitting 02/26/2020 Minutes of Hearings and Summary of Evidence and Order Submitting Case for Decision dated March 27, 2020:

> IT IS ORDERED THAT: (1) The 2/26/2020 MINUTES OF HEARING AND SUMMARY OF EVIDENCE are hereby supplemented, as set forth in this ORDER, with specific reference to ATTACHMENT A. (2) The medical treatment reimbursement issues presented in this case are submitted for decision, effective 3/23/2020, as set forth in this ORDER.

This was in response to a request from applicant for defendant to produce the claims adjuster as a witness at trial. Attached to the Order was a portion of the court reporter's transcript with the discussion during the hearing about the adjuster.

The WCJ issued the resulting F&A finding that applicant is entitled to the following: $168.20 for medical mileage expenses for two medical treatments visits with Dr. Reid (6/20/2019) and Dr. Einbaud (6/24/2019); $886.00 for medical mileage expenses for March 4, 2019, April 29, 2019, March 5, 2018, May 7, 2018, July 2, 2018, August 6, 2018, October 22, 2018, and December 17, 2017 (eight medical treatment visits with Dr. Einbaud); and reimbursement for six medical

prescriptions (and any mileage incurred for procuring these prescriptions) for Cymbalta, Wellbutrin, Abilify, Adderall, Lorazepam, and Trazodone, prescribed by Dr. Reid on June 20, 2019 and July 15, 2019. The WCJ further found that applicant may be entitled to additional payments and reimbursements for prescriptions and medical mileage expenses, but the record must be further developed to address this issue.

## DISCUSSION

### I.

The employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.)[2] Transportation expenses incurred for the purpose of obtaining medical treatment for an industrial injury is considered part of treatment benefits under section 4600. (See *Avalon Bay Foods v. Workers' Comp. Appeal Bd.* (*Moore*) (1998) 18 Cal.4th 1165 [63 Cal.Comp.Cases 902]; see also *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93] ["the employer is required to provide treatment which is reasonably necessary to cure or relieve the employee's distress, and if he neglects or refuses to do so, he must reimburse the employee for his expenses in obtaining such treatment"].)

We thus acknowledge that applicant may be entitled to reimbursement for medical mileage expenses she incurred to obtain treatment for her industrial injury. However, the February 26, 2020 Minutes of Hearing and Summary of Evidence (including the subsequent amendment to the Minutes) do not reflect that reimbursement for medical mileage was identified as an issue for trial. All of the identified issues for adjudication refer only to reimbursement for prescription expenses with no reference to medical mileage expenses. It cannot be inferred from the way the issues were framed at trial that reimbursement for medical mileage in relation to those prescriptions expenses was also an issue to be adjudicated.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d

[2] All further statutory references are to the Labor Code unless otherwise stated.

1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acc. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) A violation of a party's right to due process that prevents a party from having a fair hearing is reversible per se. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (*Pinkney*) (1994) 26 Cal.App.4th 789, 806 [59 Cal.Comp.Cases 461].)

We agree with defendant that it was improper for the WCJ to issue findings of fact and an award for medical mileage expenses when this was not an issue identified for adjudication at trial. Doing so violated defendant's right to due process and is reversible per se pursuant to the discussion above. Therefore, we will rescind the findings of fact and award with respect to reimbursement to applicant for medical mileage expenses. Applicant may pursue reimbursement for these expenses in subsequent proceedings after both parties have been given notice and an opportunity to be heard.

**II.**

As noted above, the employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.) Employers are further required to conduct UR of treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.) Section 4610.5 mandates IMR for "[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury." (Lab. Code, § 4610.5(a)(2); see also Lab. Code, § 4062(b) [an employee's objection to a UR decision to modify, delay or deny an RFA for a treatment recommendation must be resolved through IMR].)

Section 4610 provides time limits within which a UR decision must be made by the employer. (Lab. Code, § 4610 et seq.) These time limits are mandatory. In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that it has jurisdiction to determine whether a UR decision is timely. If a UR

decision is untimely, the determination of medical necessity for the treatment requested may be made by the Appeals Board. (*Id.* at p. 1300.) If the UR decision is timely, the Appeals Board has no jurisdiction to address disputes regarding the UR because "[a]ll other disputes regarding a UR decision must be resolved by IMR." (*Id.* at p. 1299.)

Subsequent to *Dubon II*, in a significant panel decision, the Appeals Board held that a UR decision that is timely made, but is not timely communicated, is untimely. (*Bodam v. San Bernardino County/Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519.)[3] In *Bodam*, the employer did not notify the requesting physician of its UR decision within 24 hours and did not send written notice of the UR decision to the physician, applicant or applicant's attorney within two business days after the UR decision was made. (*Id.* at p. 1523.)[4] The UR decision was therefore deemed untimely and the Appeals Board had the authority to determine the issue of medical necessity for the disputed treatment.

Defendant contends that the WCJ did not consider the effect of its February 9, 2018 UR decision on certain RFAs in dispute. Essentially, defendant contends that this UR decision bars certain RFAs for prescriptions already non-certified by UR pursuant to section 4610(k).

The February 9, 2018 UR decision was subject to the following former version of section 4610(i)(1):

> Except for treatment requests made pursuant to the formulary, prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five working days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician. Prospective decisions regarding requests for treatment covered by the formulary shall be made no more than five working days from the date of receipt of the medical treatment request. The request for authorization and

[3] Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

[4] It is noted that section 4610 and AD Rule 9792.9.1(e)(3) contained different language regarding communication of a UR decision when the UR decision issued in *Bodam*. (*Bodam*, *supra*, 79 Cal.Comp.Cases at p. 1522.) However, the principles outlined in *Bodam* remain applicable to this matter.

supporting documentation may be submitted electronically under rules adopted by the administrative director.

(Former Lab. Code, § 4610(i)(1), amended by Stats. 2019, ch. 647, § 6, eff. Jan. 1, 2020.)

AD Rule 9792.9.1 further provides in pertinent part:

(c) Unless additional information is requested necessitating an extension under subdivision (f), the utilization review process shall meet the following timeframe requirements:

(1) The first day in counting any timeframe requirement is the day after the receipt of the DWC Form RFA, except when the timeline is measured in hours. Whenever the timeframe requirement is stated in hours, the time for compliance is counted in hours from the time of receipt of the DWC Form RFA.

…

(3) Prospective or concurrent decisions to approve, modify, delay, or deny a request for authorization shall be made in a timely fashion that is appropriate for the nature of the injured worker's condition, not to exceed five (5) business days from the date of receipt of the completed DWC Form RFA.

…

(h) A utilization review decision to modify, delay, or deny a request for authorization of medical treatment shall remain effective for 12 months from the date of the decision without further action by the claims administrator with regard to any further recommendation by the same physician 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.

(Cal. Code Regs., tit. 8, § 9792.9.1(c)(1), (c)(3) and (h).)

The February 9, 2018 UR decision states that Dr. Reid's RFA was received on "Friday, February 2, 2018." (Defendant's Exhibit H, Broadspire utilization reviews, February 9, 2018, p. 23.)[5] Excluding the day the RFA was received per AD Rule 9792.9.1(c)(1) and the following Saturday and Sunday,[6] five working days from receipt of the RFA per former section 4610(i)(1) would fall on February 9, 2018. The UR decision was sent to applicant, applicant's attorney and Dr. Reid. Therefore, the UR decision was timely issued and communicated.

It is acknowledged that section 4610(k) provides as follows:

[5] The Appeals Board takes judicial notice of the days of the week the dates fell on pursuant to Evidence Code section 451(f). (Evid. Code, § 451(f).)

[6] See significant panel decision: *Pa'u v. Department of Forestry/Cal Fire* (2019) 84 Cal.Comp.Cases 815, 826 [2019 Cal. Wrk. Comp. LEXIS 86] ["the phrase 'working day' in Labor Code section 4610 means a day other than a Saturday, Sunday, or holiday as defined in the Government Code"].

> 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).)

Thus, the February 9, 2018 UR decision remained effective for 12 months from that date unless applicant shows that further recommendations for the same treatment were supported by a documented change in the facts material to the UR decision.

The WCJ in her Report concluded that section 4610(k) does not apply to the facts in this case. (Report, June 19, 2020, p. 27.) The WCJ also found that applicant may be entitled to additional reimbursements for prescriptions during the contested period of November 28, 2017 through July 23, 2019, but that the record required further development in order to determine that issue. (*Id.* at pp. 29-30.)

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Compensation Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

We agree with the WCJ that the record is currently insufficient to address applicant's entitlement to reimbursement for certain prescriptions during the period identified at trial. The WCJ acted within her discretion to find that the record must be further developed in lieu of attempting to issue a decision based on an inadequate record. Consequently, our new decision will include a finding of fact that the record must be developed on the other prescription expenses in dispute, which may include evidence regarding the effect of section 4610(k) on any prescriptions during the 12-month period after the February 9, 2018 UR decision.

**III.**

Although the record must be developed regarding the other prescription expenses in dispute, we agree with the WCJ that applicant has shown entitlement to reimbursement for the prescriptions recommended by Dr. Reid on June 20, 2019 and July 15, 2019.

In 2019, former section 4610(g)(2) required a physician recommending treatment for an employee to submit an RFA and supporting documentation to the employer as follows:

> Unless otherwise indicated in this section, **a physician providing treatment under Section 4600 shall send any request for authorization for medical treatment, with supporting documentation, to the claims administrator for the employer, insurer, or other entity according to rules adopted by the administrative director**. The employer, insurer, or other entity shall employ or designate a medical director who holds an unrestricted license to practice medicine in this state issued pursuant to Section 2050 or 2450 of the Business and Professions Code. The medical director shall ensure that the process by which the employer or other entity reviews and approves, modifies, or denies requests by physicians prior to, retrospectively, or concurrent with the provision of medical treatment services complies with the requirements of this section. Nothing in this section shall be construed as restricting the existing authority of the Medical Board of California.
>
> (Former Lab. Code, § 4610(g)(2), amended by Stats. 2019, ch. 647, § 6, eff. Jan. 1, 2020, emphasis added.)[7]

For RFAs communicated on or after July 1, 2013, regardless of the date of injury, AD Rule 9792.6.1 provides the following definition:

> "Request for authorization" means a written request for a specific course of proposed medical treatment.

[7] This statutory subdivision was re-designated to be subdivision (g)(2)(A) and the last sentence was amended to substitute "Nothing in this section shall be construed as restricting" with "This section does not limit."

> (1) Unless accepted by a claims administrator under section 9792.9.1(c)(2), a request for authorization must be set forth on a "Request for Authorization (DWC Form RFA)," completed by a treating physician, as contained in California Code of Regulations, title 8, section 9785.5. Prior to March 1, 2014, any version of the DWC Form RFA adopted by the Administrative Director under section 9785.5 may be used by the treating physician to request medical treatment.
>
> (2) "Completed," for the purpose of this section and for purposes of investigations and penalties, means that the request for authorization must identify both the employee and the provider, identify with specificity a recommended treatment or treatments, and be accompanied by documentation substantiating the need for the requested treatment.
>
> (3) The request for authorization must be signed by the treating physician and may be mailed, faxed or e-mailed to, if designated, the address, fax number, or e-mail address designated by the claims administrator for this purpose. By agreement of the parties, the treating physician may submit the request for authorization with an electronic signature.
>
> (Cal. Code Regs., tit. 8, § 9792.6.1(t).)

Preliminarily, with respect to the June 20, 2019 RFA, defendant issued a UR decision on July 3, 2019 certifying Dr. Reid's recommendation for medication management once per month. However, this UR decision did not address the prescription medications recommended by Dr. Reid on June 20, 2019 as part of applicant's treatment. The record does not contain a UR decision addressing the recommendation for those medications.

Defendant contends that Dr. Reid's June 20, 2019 and July 15, 2019 RFAs are defective because they did not specify the prescriptions she was recommending. The recommending physician is required to provide the DWC form RFA together with documentation identifying the requested treatment and substantiating the recommended treatment. Supporting documentation, like a progress report, may contain the injured worker's treatment history, the justification for the requested treatment, or a description of the requested treatment. Provision of documentation substantiating the need for treatment is a requirement per former section 4610(g)(2) and AD Rule 9792.6.1(t), and thus, the DWC form RFA and attached documentation must be read together as a whole. As stated by the WCJ in her Report, the claims adjuster must review the physician's accompanying documentation, not just the RFA, and review the RFA with the attached

documentation as a package in its entirety.[8]

Additionally, the claims adjuster has an affirmative duty to investigate claims and to timely provide benefits to an injured employee. (Cal. Code Regs., tit. 8, § 10109(b).) The California Supreme Court has outlined the employer's duty to provide reasonable and necessary medical treatment under the Labor Code:

> Section 4600 requires more than a passive willingness on the part of the employer to respond to a demand or request for medical aid. [Citations omitted.] This section requires some degree of active effort to bring to the injured employee the necessary relief.
>
> (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566].)

Here, Dr. Reid submitted proper requests for treatment on June 20, 2019 and July 15, 2019. Defendant did not authorize the treatment or conduct UR of all of her treatment recommendations. Thus, applicant is entitled to reimbursement for this treatment if it was reasonably required to cure or relieve from the effects of her injury. (*Dubon II*, *supra*, 79 Cal.Comp.Cases at p. 1312; *Sandhagen*, *supra*, 44 Cal.4th at p. 242.)

Dr. Reid's June 20, 2019 letter, in addition to the June 20, 2019 and July 15, 2019 progress reports, outline applicant's psychiatric treatment history, diagnosis and the medical necessity for applicant's continued use of specific prescription medications with identified dosages to treat her industrially caused major depressive disorder. Specifically, Dr. Reid stated in relevant part in the June 20, 2019 letter:

> It is my strong medical opinion that in order to maintain the stability of Mrs. Earley's mood, her current medication regimen and regular follow up medication management appointments need to be continued. Discontinuing medications and medication management appointments with me would result in a decline in her psychiatric health.

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[8] The WCJ cites to *Sandhagen*, *supra* for the case quotation in her Report about reading the DWC form RFA and supporting documentation as a whole. (Report, May 14, 2020, pp. 46-47.) However, this quotation is not from *Sandhagen*, it is from a panel decision: *Ives v. DR Meyers Distributing Co.* (April 30, 2018, ADJ11025609) [2018 Cal. Wrk. Comp. P.D. LEXIS 184].) Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and may be considered to the extent that their reasoning is persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

Medical necessity for these medications is also bolstered by Dr. Reid's April 26, 2019 deposition testimony regarding the necessity of these prescriptions and the potential consequences of discontinuing them, as well as Dr. Reid's other progress reports and letters. (See e.g., Applicant's Exhibit No. 6, Correspondences from Dr. Grace Reid, dated May 18, 2017, October 30, 2018 and June 20, 2019.) Applicant's trial testimony regarding the impact of these prescriptions and Dr. Reid's treatment regimen indicates that these medications provide relief from the effects of the psychiatric injury.

In conclusion, we will rescind the F&A and issue a new decision finding that applicant is entitled to reimbursement for the prescriptions recommended by Dr. Reid as outlined herein. Our decision will include a finding of fact and order consistent with the WCJ's finding of fact that the issue of whether applicant is entitled to reimbursement for the other prescriptions in dispute requires further development of the record. The new decision will retain the parties' trial stipulations and reflect the 2011 Stipulations with Request for Award. (See Lab. Code, § 5702; see also *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].)

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award issued by the WCJ on May 14, 2020 is **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

**FINDINGS OF FACT**

1. Michele Earley, while employed during the period from April 13, 1997 through April 13, 1998, as an administrative assistant, occupational group number not identified, at San Juan Capistrano, California, by Cox Communications, sustained injury arising out of and in the course of employment to her neck and psyche.

2. At the time of injury, the employer's workers' compensation carrier was Insurance Company of the State of Pennsylvania, adjusted by Broadspire.

3. The parties stipulated that applicant's injury caused permanent disability of 85% and that she is entitled to future medical treatment to cure or relieve from the effects of her injury pursuant to the March 23, 2011 Stipulations with Request for Award.

4. Applicant has received some medical treatment. Applicant's primary treating physician is Dr. Einbaud.

5. No attorney fees have been paid and no attorney fee arrangements have been made, with the exception of previous attorney fee awards and orders which have been issued in this case.

6. Applicant is entitled to six medical prescriptions, namely Cymbalta, Wellbutrin, Abilify, Adderall, Lorazepam, and Trazodone, prescribed for her by Dr. Reid on June 20, 2019 and July 15, 2019, and therefore to reimbursement for these prescription expenses. The amount of reimbursement to applicant is to be adjusted between the parties with jurisdiction reserved in the event of a dispute.

7. There is insufficient evidence in the record to address applicant's entitlement to reimbursement for the other prescription expenses during the period from 11/28/2017 through 7/23/2019.

## AWARD

**AWARD** is made in favor of **MICHELE EARLEY** against **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,** adjusted by **BROADSPIRE**, for reimbursement for medical treatment pursuant to Finding of Fact No. 6.

## ORDER

**IT IS ORDERED** that the record must be further developed regarding the other disputed prescription expenses pursuant to Finding of Fact No. 7.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MARCH 15, 2022**

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

**DIETZ GILMORE & CHAZEN**
**MICHELE EARLEY**
**THOMAS MARTIN**

**AI/*pc***

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