WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERICA PULIDO, *Applicant*

vs.

CAPABUNGA; PROCENTURY INSURANCE COMPANY/ILLINOIS MIDWEST INSURANCE AGENCY, LLC, *Defendants*

Adjudication Number: ADJ13705745
Santa Rosa 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 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, which we adopt and incorporate, we will deny reconsideration.

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 WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 7, 2022

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

ERICA PULIDO
KNEISLER & SCHONDEL
LAW OFFICES OF BRADFORD & BARTHEL

HAV/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant, Illinois Midwest Insurance Agency, LLC on behalf of ProCentury Insurance Company, through their attorney of record, Louis Larres of Bradford Barthel, filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated April 14, 2022.

Applicant suffered an industrial injury to her neck and right shoulder on January 28, 2019 as a production supervisor, for the employer Capabunga. The injury occurred when the applicant was pulling boxes from an overhead pallet. She was age 34 on the date of injury.

In a Findings and Orders dated April 14, 2022, the undersigned WCJ found that the Utilization Review non-certification decision of January 26, 2022 was not timely communicated to the applicant's attorney pursuant to CCR §9792.9.l(e)(3). A determination of whether the requested medical treatment is reasonable and necessary was deferred with WCAB jurisdiction reserved.

Petitioner contends:

a. Defendant substantially complied with the requirements of Section 4610(i)(4) and Rule 9792.9.l(e)(3). *Petition, page 3, line 14 to page 5, line 15*.
b. Applicant should be estopped from asserting she was not timely notified of the UR denial. *Petition, p. 5, line 16-p. 7, line 2*.
c. The WCAB's decision in *Bodam* was wrongly decided. *Petition p. 7, line 3 - p. 8, line 8*.

II FACTS

Applicant sustained an industrial injury on January 28, 2019 to her neck and right shoulder during the course of her employment as a production supervisor for Capabunga. The applicant's primary treating physician, Christian Athanassious, M.D., issued a Request for Authorization (RFA) for three rounds of trigger point injections in the deep and superficial tissue-cervical spine from C5-C7 on January 20, 2022. (App. Exh. 12.)

A Utilization Review (UR) denial subsequently issued on January 26, 2022. (App. Exh. 11/Def. Exh. B.) The Proof of Service attached to the UR denial, also dated January 26, 2022, listed the physical addresses of the recipients: Dr. Athanassious, Kneisler & Schondel and Erica Pulido. (Def. Exh. D.) However, the postmark on the envelope addressed to Kneisler & Schondel was dated February 1, 2022, four business days after the UR decision was made. (App. Exh. 10.)

This matter proceeded to an Expedited Hearing on the sole issue of whether the Utilization Review denial was timely communicated to the applicant's attorney. An F&O issued finding that the Utilization Review non-certification decision of January 26, 2022 was not timely communicated to the applicant's attorney pursuant to CCR §9792.9. l(e)(3). Based on the prior agreement of the parties, a determination of whether the requested medical treatment is reasonable and necessary was bifurcated and deferred with WCAB jurisdiction reserved.

It is from this Findings and Order that petitioner seeks reconsideration.

III
DISCUSSION

A defendant must comply with all of the timeliness requirements of Labor Code section 4610. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]). The utilization review time deadlines of section 4610(g)(l) are mandatory and, if a defendant fails to meet these mandatory deadlines, it is precluded from using the utilization review procedure for the particular medical treatment dispute in question. (*SCIF v. WCAB* (*Sandhagen*) (*Supra*) 73 CCC 981.) The defendant must comply not only with the requirement to make a UR decision within the time frames specified in section 4610 but also must also comply with the requirement to communicate that decision within the specified time frames.

Section 4610(g)(3)(A) provides as follows:

> "Decisions to approve, modify, delay, or deny requests by physicians for authorization prior to ... the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision. Decisions resulting in modification, delay, or denial of all or part of the requested health care service shall be communicated to physicians initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or within two business days of the decision for prospective review, as prescribed by the administrative director."

Here, petitioner candidly admits that the communication was not timely mailed to applicant's counsel but "defendant substantially complied with the requirements of Labor Code section 4610(i)(4) and Rule 9792.9.l(e)(3)". (Petition, p. 3, lines 25-27.) Petitioner argues that since the applicant had been served, albeit, late by a 'few days at worst' there has been substantial compliance with the statutory requirements. (Petition, p. 4, lines 26-28.) The court disagrees.

Administrative Director Rule 9792.9.l(e)(3) states that:

> For prospective, concurrent, or expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be followed by written notice to the requesting physician, the injured worker, and if the injured worker is represented by counsel, the injured worker's attorney within

> 24 hours of the decision for concurrent review and within two (2) business days for prospective review and for expedited review within 72 hours of receipt of the request.
> (Cal. Code Regs., tit. 8, § 9792.9.1, subd. (e)(3).)

The statutory language is neither ambiguous nor vague. In interpreting a statute, we begin with its text, as statutory language typically is the best and most reliable indicator of the Legislature's intended purpose. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) The Board is not empowered to lend a different construction to the statute. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 (58 Cal.Comp.Cases 286) [When the language is clear and there is no uncertainty as to the legislative intent, courts look no further and simply enforce the statute according to its terms.].)

Notably absent from the express language of the statute is a reference to "substantial compliance" as method to satisfy the time requirements. Similarly, there is no mention of a party being excused from the requirements of Labor Code section 4610 when the applicant was not "prejudiced" and able to timely file an application for Independent Medical Review. (Petition, p. 4, lines 23-24.) In fact, the court is unaware of any authority, nor was any provided by the petitioner, for the proposition that as long as a timely IMR application was filed, the UR denial need not be timely communicated.

Petitioner urges the court to consider the circumstances of an earlier Expedited Hearing in this matter. At that time, the parties stipulated that applicant's attorney did not receive the faxed copy of the UR denial for a psychiatric evaluation because an incorrect fax number was used. (EAMS Doc. No. 40200333.) Subsequently, an Order Vacating Submission was issued, at the parties' request, due to the defendant agreeing to authorize the denied medical treatment. (EAMS Doc. No. 74926641.)

Given this history, petitioner contends that the applicant should have provided defendant with the correct fax number and therefore, "applicant should be estopped from denying untimely communication of the January 26, 2022 UR decision". (Petition p. 5, lines 14-16; lines 26-27.) The court disagrees.

Petitioner's argument ignores that the burden is placed on the defendant, not the applicant, to prove UR is timely and properly conducted, and failure gives applicant the right to proceed to Expedited Hearing on denied medical treatment. (*Becerra v. Utica National Insurance Company* (2012) 40 CWCR 264 (WCAB).) Additionally, the prior untimely UR begs the question of why the exact same fax number was used for service on applicant's counsel when the parties already stipulated it was an incorrect.

The California Evidence Code defines estoppel as "whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.) The estoppel theory is inapplicable here.

Finally, the petitioner oddly asserts that "the WCAB's decision in *Bodam v. San Bernandino County* (2014) 79 Cal. Comp. Cases 1519, should be revisited as it was wrongly decided". (Petition, p. 7, lines 4-5.)

In *Bodam v. San Bernardino/Department of Social Services*, the appeals board issued a significant panel decision holding that in order for a UR decision to be considered timely, a defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision. (*Bodam v. San Bernandino County* (2014) 79 Cal. Comp. Cases 1519.)

Although not binding precedent, as a significant panel decision, the *Bodam* opinion is intended to augment the body of binding appellate and en banc decisions by providing further guidance to the workers' compensation community. (CCR §10305(r).) Contrary to petitioner's alleged "errors" with the decision, the holding in *Bodam* has not been subsequently overturned and remains good law to date.

Nonetheless, this court finds no faults with the holding in *Bodam* and deems it relevant to the facts at hand. Applying *Bodam*, a UR decision that is timely made but is not timely communicated is untimely and invalid. The mandatory language within Labor Code §4610(g)(3)(A) is controlling and petitioner's failure to strictly comply with the statutory requirements cannot merely be overlooked or disregarded.

IV.
RECOMMENDATION

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

Dated: May 19, 2022

Respectfully submitted,

Katie F. Boriolo
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE