

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MICHAEL FISHEL, *Applicant*

vs.

**RICK'S LUBE AND COMPLETE AUTO;
OAK RIVER INSURANCE COMPANY,
adjusted by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ11053430
Long Beach District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer 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 based upon the WCJ's Report, which we adopt and incorporate in part, we will grant the Petition solely to amend the decision to remove the award and replace it with an order that determination of whether applicant should be authorized for the lumbar spine surgery will be submitted to the qualified medical evaluator (QME) and Dr. Dorsey in lieu of utilization review (UR) and independent medical review (IMR).¹ We will otherwise affirm the Findings and Award (F&A) based upon the WCJ's analysis of defendant's arguments in the WCJ's Report.

Finding of Fact No. 4 states:

Pursuant to the Stipulation of the parties, dated February 3, 2020, and the agreement of the parties, reflected in the Minutes of Hearing ("MOH") from the Status Conference on May 28, 2020, the determination of whether the applicant should be authorized to proceed with lumbar spine surgery is deferred to the determinations of the orthopedic Panel Qualified Medical Evaluator ("PQME"),

¹ We do not adopt and incorporate the section of the WCJ's Report entitled "The Court's Findings and Award are Within the Scope of the February 3, 2020, Stipulation" on pages 9-10 of the Report.

Vincent Gumbs, M.D., and the psychiatric clearance by E. Richard Dorsey, M.D., rather than the Utilization Review/Independent Medical Review process.

(F&A, December 28, 2020, p. 2.)

An award was made for “further medical care related to the potential lumbar spine surgery in line with the opinions of PQME Gumbs and Dr. Dorsey.”

We will amend the F&A to remove the award and instead provide an order that determination of whether applicant should be authorized for the lumbar spine surgery will be submitted to the QME and Dr. Dorsey. The F&A will otherwise be affirmed.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration of the Findings and Award issued by the WCJ on December 28, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award issued by the WCJ on December 28, 2020 is **AFFIRMED** except that it is **AMENDED** as follows:

[The Award is rescinded in its entirety and replaced by the Order below.]

ORDER

IT IS ORDERED that determination of whether the applicant should be authorized to proceed with lumbar spine surgery is deferred to the determinations of the orthopedic Panel Qualified Medical Evaluator (“PQME”), Vincent Gumbs, M.D., and the psychiatric clearance by E. Richard Dorsey, M.D., rather than the Utilization Review/Independent Medical Review process.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2021

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

**HEFLEY LAW
MICHAEL FISHEL
MOORE & ASSOCIATES**

AI/pc

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**

I

INTRODUCTION

- | | | |
|----|--|--|
| 1. | Applicant's Occupation: mechanic/manager) | (Not established: potentially auto |
| | Applicant's Age: | 53 |
| | Date of Injury: | August 18, 2017 |
| | Parts of Body Injured: | Lumbar Spine |
| 2. | Identity of Petitioner: | Defendant filed the petition. |
| | Timeliness: | The petition was timely filed. |
| | Verification: | The petition was verified. |
| 3. | Date of Issuance of Findings and Order: | December 28, 2020 |
| 4. | Petitioner's Contentions: | The defendant contends that: (1) That by the Order made and filed by the Workers' Compensation Administrative Law Judge (the undersigned), the Appeals Board acted without or in excess of power; (2) The evidence does not justify the findings of fact; and (3) The findings of fact do not support the order and decision. It is noted that defendant also contends that the undersigned fails to achieve substantial justice as required by California's Constitution. |

II

FACTS

On or about October 11, 2017, the applicant, Michael Fishel, filed an Application for Adjudication of Claim for an injury occurring on August 18, 2017, to the applicant's back, hips, leg, body system-unspecified, and excretory system.

The parties proceeded to utilize Vincent Gumbs, M.D., as a Panel Qualified Medical Evaluator ("PQME"). The first PQME appointment occurred on August 7, 2018.

The applicant's primary treating physician ("PTP"), William Mealer, M.D., requested authorization for a L5-S1 lumbar decompression and fusion, which was denied by Utilization Review ("UR") on or about March 1, 2019. (Defendant Exhibit C.)

PTP Mealer repeated similar requests for authorization (“RFA”) for a L5-S1 lumbar decompression and fusion on September 10, 2019, and October 10, 2019, which were non-certified and upheld by Independent Medical Review (“IMR”) on or about October 31, 2020. (Defendant Exhibits D & E.)

Again, PTP Mealer issued a RFA for a lumbar decompression, dated November 22, 2019. In response, the defendant issued a “Notice of IMR Uphold” with the October 31, 2020 IMR Uphold. (Defendant’s Exhibit G.)

There was some dispute regarding whether there was a basis for the November 22, 2019, RFA for lumbar spine surgery was proper based on changed circumstances: namely that the applicant allegedly ceased smoking. In response, the defendant alleges that this potential change of circumstance is not accurate based on subrosa video.

The applicant’s attorney filed a December 10, 2019, dated Declaration of Readiness to Proceed (“DOR”) for Expedited Hearing that stated, “PTP FILED RFA ON 11/22/19. DEFENDANTS REFUSED TO CONDUCT UR THEREFORE CONFERRING JURISDICTION ON WCAB. LETTER SENT TO DEFENSE ON 12/06/2019.” The Expedited Hearing was set on February 3, 2020.

At this Expedited Hearing on February 3, 2020, the applicant was represented by “Ola Moore” and the defendant was represented by “Nick Flint” of Hefley Law. Rather than proceed with an Expedited Trial addressing the issues raised by the corresponding DOR, the parties instead reached the following Stipulation: **“Defendants will authorize MRI of lumbar spine to be submitted to PQME Dr. Gumbs for review and opinion on spinal surgery recommended by Dr. Mealer. Parties agree to submit need for spinal surgery to Dr. Vincent L. Gumb (sic), M.D. for his medical opinion regarding reasonableness and necessity; WCAB jurisdiction is reserved.”** (Applicant Exhibit 5.) In light of this Stipulation, the Expedited Hearing on February 3, 2020, was taken off calendar.

As previously noted in the undersigned’ Opinion on Decision, the February 3, 2020, Stipulation between applicant’s attorney, Mr. Moore, and defense attorney, Mr. Flint, was described as a “Stip & Order” in the companion Minutes of Hearing (“MOH”) from that date (Applicant Exhibit 6) and was executed by both parties, this Judge inadvertently did not sign the Stipulation. As such, this document will be referred to as a Stipulation rather than a Stipulation and Order and has been treated as an agreement between the parties.

The applicant’s attorney sent letter to defense attorney, dated March 26, 2020, and April 9, 2020, both making reference to the Stipulation from February 3, 2020. (Applicant Exhibits 11 and 12.)

The applicant's attorney filed a March 30, 2020, dated DOR for Expedited Hearing, and stated, "DEFENDANT HAVE REFUSE TO AUTHORIZE SURGERY AND PAIN MEDICATION RECOMMENDED BY PTP/DR. MEALER AND PQME/DR. BUMBS. LETTER SENT TO DEFENDANT DATED 3/26/20. WCAB ASSISTANE IS REQUESTED." At approximately the same time, the applicant's attorney filed a Petition for Order Allowing Additional Panel QME in Psychology, dated March 28, 2020. This case was ultimately set for a Status Conference on May 28, 2020, by this Court based on the Petition of Order Allowing Additional Panel QME in Psychology filed by applicant's attorney.

The Status Conference on May 28, 2020, was conducted telephonically per the COVID-19 protocols. The applicant was again represented by Ola Moore and the defendant was again represented by Nick Flint. The MOH for the Status Conference on May 28, 2020, states, "**Parties jointly request continuance to Expedited Hearing on the issue of the authorization of spinal surgery per 2/3/2020 Stip & Order. A counsel, Mr. Flint, represents that spinal surgery will be authorized if psych doctor clears applicant for surgery.**" It is noted that for telephonic conferences, the undersigned reads the language written on the MOH to the parties during the hearing and any corrections or changes requested by the parties are immediately addressed. Here, neither party requested any alterations to the language in the MOH at the time of the hearing. This matter was continued to an Expedited Hearing on July 6, 2020. Additionally, it is further noted that defense attorney, Nick Flint, did not raise any objections to the language in the MOH from May 28, 2020, either writing or in his subsequent appearance at the Expedited Hearing on July 6, 2020. (Applicant Exhibit 8.)

The letter from the applicant's attorney to the defense attorney, dated June 18, 2020, makes reference to the agreement from the MOH on May 28, 2020. (Applicant Exhibit 13.)

The parties utilized Eugene Richard Dorsey, M.D., to provide psychiatric clearance for the applicant's potential lumbar spine surgery. (Applicant Exhibit 3a.)

At the time of the July 6, 2020, Expedited Hearing, the applicant was again represented by Ola Moore and the defendant was again represented by Nick Flint. Following discussions with the parties, the Expedited Hearing was continued as it appeared a necessary witness from defendant would not be available. It is noted that this would be the last appearance of Nick Flint as defense counsel for defendants. It is further noted that as of July 6, 2020, defense counsel Flint had never raised an objection, either in writing or with this Court during a hearing, to the Stipulation of the parties from February 3, 2020, or the language memorializing the parties' agreement on May 28, 2020.

At the August 18, 2020, dated Expedited Hearing, the applicant was initially represented by Jerome Welch and later by Ola Moore and the defendant was represented by Chris Hefley, also of Hefley Law. It was determined that the MOH from July 6, 2020, was not properly served and the hearing was continued. The parties were also ordered to file a joint proposed pre-trial conference statement 10 days before the next Expedited Hearing. Additional scheduling irregularities occurred, and the next Expedited Hearing was ultimately set on notice for November 3, 2020.

On November 3, 2020, following preliminary discussions with the parties about the main issues relevant to the Expedited Hearing(s), the undersigned determined that the threshold issue was whether the parties' stipulation, dated February 3, 2020, and the agreement of the parties reflected in the MOH from May 28, 2020, superseded the UR/IMR process as it pertains to the applicant's potential lumbar spine surgery. The potential medical treatment sought by the applicant hinged on this issue. As such, the parties agreed to proceed with an Expedited Trial based solely on this issue.

The Findings and Award and Opinion on Decision were served on December 28, 2020. In summary, the undersigned found that, pursuant to the Stipulation of the parties, dated February 3, 2020, and the agreement of the parties reflected in the MOH from May 28, 2020, the determination of whether the applicant should be authorized to proceed with lumbar spine surgery is deferred to PQME Gumbs in conjunction with the psychiatric clearance by Eugene Richard Dorsey, M.D., rather than the UR/IMR process. An Award of further medical care related to the potential lumbar spine surgery in line with the opinions of PQME Gumbs and Dr. Dorsey was issued. It is from this Findings and Award that Defendant petitions for Reconsideration.

III

DISCUSSION

The Court Did Not Act In Excess of Power Regarding Surgery

Petitioner initially argues that the undersigned's "Findings and Award is in excess of his power as the surgery awarded has been repeatedly non-certified through UR and upheld as medically unnecessary throughout the IMR process."

Firstly, the undersigned believes it is important clarify that Petitioner is mischaracterizing the Findings and Award of the undersigned. Contrary to what Petitioner states, surgery has not specifically been awarded. It has been found that, "the determination of whether the applicant should be authorized to proceed with lumbar spine surgery is deferred to the determination of the orthopedic PQME, Vincent Gumbs, M.D., and the psychiatric clearance by E. Richard Dorsey, M.D., rather than the Utilization Review/Independent Medical Review process (emphasis added)." The Award provided "further medical care related

to the potential lumbar spine surgery in line with the opinions of PQME Gumbs and Dr. Dorsey (emphasis added).” This is not specifically an award of surgery and is an important distinction as the undersigned is not simply awarding surgery to the applicant. Instead, based on the stipulation and agreement of the parties from February 3, 2020, and May 28, 2020, respectively, the means of determining whether lumbar surgery is appropriate for the applicant has shifted from the UR/IMR process to PQME Gumbs and Dr. Dorsey (as it relates to psychiatric clearance).

The present case facts do fall into one of the two exceptions recognized by the Workers’ Compensation Appeals Board (“WCAB”) to circumvent the UR/IMR process: namely when the parties have agreed to waive their right to pursue the statutory review process. (Allied Signal Aero. v. Workers’ Comp. Appeals Bd., (Wiggs) (2019) 84 Cal. Comp. Cases 367, 369-370.) The other exception is an untimely UR, which is not relevant here. The WCAB retains jurisdiction to determine whether the requested medical treatment is reasonable and necessary. (Id.)

Petitioner has argued that the circumstances surrounding the multiple RFAs for lumbar spine surgery do not give rise to this Court’s intervention into the UR/IMR process as it is allegedly clear that the RFAs were properly denied by UR and upheld by IMR. If these same circumstances and related evidence were raised at the time of the initial Expedited Hearing on February 3, 2020, then Petitioner might have prevailed at that time. However, these circumstances and related evidence were not presented to this Court on February 3, 2020. Rather than proceeding with an Expedited Trial, the parties entered into a signed stipulation with the following language: **“Defendants will authorize MRI of lumbar spine to be submitted to PQME Dr. Gumbs for review and opinion on spinal surgery recommended by Dr. Mealer. Parties agree to submit need for spinal surgery to Dr. Vincent L. Gumb (sic), M.D. for his medical opinion regarding reasonableness and necessity; WCAB jurisdiction is reserved.”** In light of the February 3, 2020, stipulation of the parties, the undersigned did not act in excess of its power when it found that the determination of whether the applicant should be authorized to proceed with lumbar spine surgery is deferred to the determination of the orthopedic PQME, Vincent Gumbs, M.D., rather than the Utilization Review/Independent Medical Review process. In fact, the parties specifically reserved WCAB jurisdiction for this stipulation.

The Court Did Not Act in Excess of Jurisdiction

Petitioner further argues that the circumstances of this case do not give rise to this Court’s jurisdiction as there was no assertion that there is or was an untimely UR decision. As discussed above, the language of the parties’ stipulation on February 3, 2020, gave rise to this Court’s jurisdiction. Furthermore, case law based on Wiggs supports this Court’s jurisdiction. (Id.)

The Parties' Intent in the Stipulation from February 3, 2020, is Clear Based on the Contemporaneous Circumstances

Petitioner points out that pursuant to the Wiggs case, the Stipulation itself will control what was waived and that any such waiver must be carefully scrutinized for its intended scope. (84 Cal. Comp. Cases 367) The undersigned does not disagree. Here, the plain language of the parties in the February 3, 2020, Stipulation is: **“Defendants will authorize MRI of lumbar spine to be submitted to PQME Dr. Gumbs for review and opinion on spinal surgery recommended by Dr. Mealer. Parties agree to submit need for spinal surgery to Dr. Vincent L. Gumb (sic), M.D. for his medical opinion regarding reasonableness and necessity; WCAB jurisdiction is reserved.”** In the context of February 3, 2020 Expedited Hearing, wherein there was an alleged refusal by the defendant to conduct a UR, the undersigned concludes that the most likely interpretation of the language provided by the parties, would be that the parties are submitting the potential need for lumbar spinal surgery to Dr. Gumbs, and waiving the UR/IMR process, at least as it relates to the potential lumbar spinal surgery. Any other interpretation would be unreasonable and unlikely and would not address the issue arising from the UR for lumbar surgery.

Following this stipulation, the applicant's attorney sent two letters to defense attorney, dated March 26, 2020, and April 9, 2020, (Applicant Exhibits 11 and 12), which both make reference to this February 3, 2020, stipulation. No contemporaneous correspondence from defense attorney contradicting these letter from applicant's attorney was offered by parties. Several months later, an August 24, 2020, dated Affidavit of Nick Flint (Defendant Exhibit N) was filed. This Affidavit does contest waiving the UR/IMR process and the authority to do so. However, as discussed below, less evidentiary weight is given to this Affidavit.

Furthermore, following the initial stipulation of the parties on February 3, 2020, the MOH from the Status Conference on May 28, 2020 memorialized discussions between the parties, including a statement made by defense counsel, Mr. Flint: “Parties jointly request continuance to Expedited Hearing on the issue of the authorization of spinal surgery per 2/3/2020 Stip & Order. Δ counsel, Mr. Flint, represents that spinal surgery will be authorized if psych doctor clears applicant for surgery.” While defense counsel now disputes the language from both February 3, 2020, and May 28, 2020, the undersigned does note that defense attorney, Nick Flint, did not raise any objections to any of this language, either writing or in his subsequent appearance at the Expedited Hearing on July 6, 2020. (Applicant Exhibit 8.) It is further noted that the agreement of the parties regarding psychiatric clearance for surgery is also supported by the letter sent by applicant's attorney to defense attorney, dated June 18, 2020 (Applicant Exhibit 13.)

Petitioner overlooks the actions (or lack thereof) taken by his predecessor handling attorney. Petitioner further suggests that if the undersigned “felt there was ANY ambiguity regarding the intent of the parties, he should have ordered development of the record.” Based on the actions of the predecessor handling attorney, there was no ambiguity about the intent of the parties to utilize PQME Gumbs and Dr. Dorsey to determine the issue of whether the applicant should have lumbar spine surgery. It was not until the handling defense attorney was changed to Chris Hefley in August 2020, that any action was taken contest the prior stipulations and agreements of the parties.

The Court’s Interpretation of the Prior Stipulations is Supported by the Evidence

Contrary to Petitioner’s inference that this Court’s interpretation of the Stipulations is not supported by the evidence, the undersigned’s interpretation of the prior stipulation is, in fact, supported by the most credible evidence.

One of the exhibits proffered by defense counsel for this Expedited Trial was the August 24, 2020, dated Affidavit of Nick Flint (Defendant Exhibit N), who was the original handling defense attorney from Hefley Law. Since approximately August 2020, the handling of this case was transferred to Christopher Hefley, also of Hefley Law, from Mr. Flint. In summary, the Affidavit of Nick Flint advises that he (Mr. Flint) did not waive the rights of the defendant regarding the UR/IMR process and that he (Mr. Flint) was not authorized to override the prior UR non-certifications. Mr. Flint further states that he believes the language in the MOH from May 28, 2020, do not accurately reflect his intention or statement regarding the applicant’s entitlement to surgery.

Contrary to the statements made by Mr. Flint in his August 25, 2020 Affidavit, Mr. Flint’s actions and apparent words up until and through his last appearance in this case on July 6, 2020, do not suggest that he intended to maintain the UR/IMR process (as it specifically relates to the potential lumbar spine surgery). Mr. Flint was also apparently agreeable to “submitting the need for spinal surgery” to PQME Gumbs in the Stipulation from February 3, 2020, and stating that spinal surgery would be authorized if a psychiatric doctor clears the applicant for surgery in the MOH from May 28, 2020. Furthermore, Mr. Flint had ample opportunity to correct or object to the language in the Stipulation from February 3, 2020 and the language in the MOH from May 28, 2020, but there is no evidence of any such corrections or objections until after the handling defense attorney for this case was changed to Mr. Hefley in August 2020. Again, it is noted that Mr. Flint himself appeared for the Expedited Hearing on July 6, 2020, (after the MOH from May 28, 2020 was served) and Mr. Flint at that point still did not raise any issues related to the accuracy of the prior agreements or stipulations.

In opposition to the Affidavit of Mr. Flint are stipulations/agreements from February 3, 2020, and May 28, 2020, the multiple letters from applicant's attorney to defense attorney without response/objection as to the stipulations/agreements, and the lack of timely objections raised by prior defense counsel, Mr. Flint.

It is also noted that that between Petitioner (current handling defense attorney), the applicant's attorney (Mr. Moore), and the undersigned, the only individual who was not at either the February 3, 2020, or the May 28, 2020, hearings was current defense attorney/Petitioner. Based on the undersigned's observation at the relevant hearings, the terms of the February 3, 2020, Stipulation and the Agreement from May 28, 2020 were both supported by the comments and the behavior of Mr. Flint and Mr. Moore.

In light of these considerations, the Affidavit of Mr. Flint is given less evidentiary weight. The interpretation of the February 3, 2020, stipulation between the parties is based on evidence that is given greater weight by the undersigned based on the circumstances of this case.

...

The Expedited Hearing and Award were Proper and Reasonable

It is uncontested that the core of the issues raised by the applicant for the Expedited Hearing was medical treatment, specifically related to the potential lumbar spine surgery recommended by PTP Mealer and PQME Gumbs. After discussion with the parties on the day of the Expedited Hearing/Trial (November 3, 2020), it became clear that the threshold issue was whether the parties should utilize PQME Gumbs to address the dispute pursuant to the February 3, 2020, Stipulation, or whether UR/IMR was still in effect. Although this determination could be characterized as an interpretation of a prior agreement, addressing this threshold issue would dictate how approach medical treatment related to the potential lumbar spine surgery and doing so was necessary to address the medical treatment issue. Neither the applicant's attorney, nor the defense attorney, objected to proceeding on this issue at the time of the Expedited Hearing.

The Reports of PQME Gumbs and Dr. Dorsey are the Most Substantial Available Medical Evidence

Whether the reporting by PQME Gumbs or Dr. Dorsey are substantial medical evidence was not specifically at issue for this Expedited Hearing. However, as the undersigned has determined that the parties should utilize PQME Gumbs and Dr. Dorsey to address the applicant's potential lumbar spine surgery, the parties must first attempt to address any substantial medical evidence with the respective physicians.

As it presently stands, the reports of PQME Gumbs appear to be the most substantial available medical evidence.

The Decision of this Court Does Achieve Substantial Justice

Contrary to the argument of Petitioner, the Findings and Award of this Court does achieve substantial justice. After weighing the available evidence, in conjunction with the timeline and circumstances of this case, the undersigned has determined that an agreement exists between the parties to utilize PQME Gumbs to address the potential need for lumbar spine surgery.

Petitioner repeatedly stating that defendant did not waive the statutory use of the UR/IMR process does not erase the words and actions of the prior handling defense attorney. It is again noted that rather than proceed with an Expedited Trial on February 3, 2020, based on the evidence Petitioner insists would have resulted in the defendant prevailing, the handling defense attorney on February 3, 2020, elected to enter into the stipulation at issue for this trial. In consideration of the circumstances of the Expedited Hearing and the subsequent actions of prior handling defense attorney, the only reasonable interpretation of the February 3, 2020, Stipulation is to waive UR/IMR process and proceed with PQME Gumbs to determine the potential need for lumbar spine surgery.

The substantial justice provided by this Court is validating the agreement between the parties that Petitioner seeks to undermine and ignore. Changing attorneys should not result in a nullification of past agreements. If the agreements between the representatives of parties are not binding, or if representatives appear with limitations on their authority that are not disclosed until several months after an agreement or stipulation is entered into, then the very foundation of our legal system would be in question.

**IV
RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that the defendant's Petition for Reconsideration be denied.

Respectfully submitted,
DATE: January 28, 2021

Gene W. Lee
WORKERS' COMPENSATION JUDGE