

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

BABAK KHADAMEHBEHNAM, *Applicant*

vs.

**ALIMAK HEK, INC, and COMMERCE & INDUSTRY, administered by
GALLAGHER BASSETT / AIG CLAIMS SERVICES, INC., *Defendants***

Adjudication Number: ADJ10501131

Van Nuys District Office

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

Applicant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on August 7, 2023, wherein the WCJ found that applicant "did not sustain his burden of proof as to the allegation of untimely UR." (Findings, p. 1.)

Applicant contends that the trial record does not contain a proof of service of the Utilization Review (UR) determination and failure to properly serve applicant and his counsel makes the UR Determination untimely.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the Findings, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his shoulders, low back, and right knee while employed by defendant as a sales manager on August 20, 2015. He received medical treatment from his primary treating physician (PTP) Edwin Haronian, M.D.

Review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that on June 15, 2021, applicant substituted Equitable Law Tarzana/Michale Moghtader, Esq for his prior his attorney, Konrad Kuenstler.¹

The Utilization Review Department of Health Direct, Inc., (HDi) issued a UR Request for Additional Information dated August 31, 2022, indicating that Dr. Haronian's Request for Authorization (RFA) had been received on August 29, 2022, and stating that:

After careful review of the submitted medical information, we cannot process your request for the medical services/treatment indicated above at this time. The medical information submitted was not sufficient for us to complete our review. ... ¶ Please clarify which procedure Dr Haronian is requesting: Left Shoulder Arthroscopy with Subacromial Decompression, Mumford Procedure, Possible Rotator Cuff Repair: with or without the possible rotator cuff repair? (Joint Exh. A.)

HDi subsequently issued a UR Determination Denial dated September 8, 2022, denying the left shoulder surgery requested by Dr. Haronian. (Joint Exh. B.)² Dr. Haronian submitted an Appeal to the UR Determination, "...requesting an appeal by an unbiased physician." (App. Exh. 1, Edwin Haronian, M.D., September 20, 2022, p. 2.)

The parties proceeded to trial on July 5, 2023, and they stipulated that the only issue submitted for decision was "Utilization Review untimeliness." (Minutes of Hearing, July 5, 2023, p. 2.)

DISCUSSION

We must first point out that it is well established that any award, order or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed*

¹ The Notice of Dismissal of Attorney and the Substitution of Attorneys were both served on Everest National Insurance Oakland not on Commerce & Industry or defense counsel Skebba Isaac & Buechler/Sun Park Esq.

² The UR Request for Additional Information and the UR Determination Denial were served on Dr. Haronian, applicant, and Konrad Kuenstler, but not on Equitable Law Tarzana. (See Joint Exh. A, p. 1 and Joint Exh. B, p. 2.)

Corporation (2001) (Appeals Board *en banc*) 66 Cal.Comp.Cases 473, 476.) The Labor Code and the Appeals Board's rules contain explicit instructions concerning the contents of the record of a case. It is the responsibility of the parties to ensure that the record is complete when a case is submitted for decision on the record. (*Ibid*, 477.)

As stated by the WCJ:

Applicant's attorney's asserts that the utilization review denial was untimely. The evidence submitted by applicant's attorney did not include the RFA or the medical report of Dr. Haronian dated 08-31-2022 with proof of service. These would be the threshold documents to start the utilization review analysis. (Opinion on Decision; see also Report, p. 3.)

We agree with the WCJ that absent those documents we have no factual basis for determining the issue of whether the UR was or was not timely. As noted above, any award, order, or decision of the Appeals Board must be supported by substantial evidence and the Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*Lamb v. Workmen's Comp. Appeals Bd.*, *supra*]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

Also, pursuant to Administrative Director Rule 9792.9.1:

(e) Decisions to modify, delay, or deny a request for authorization. ...

(3) 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(e)(3); see also § 9792.9.1(f)(4).)

As noted above (see footnote 2), there is no evidence in the record indicating that that the UR Request for Additional Information and the UR Determination Denial were served on applicant's counsel.

Again, absent the documents discussed herein being admitted into evidence there is no factual basis for the Appeals Board (including the WCJ) to determine the timeliness of the UR Determination.

Accordingly, we grant reconsideration, rescind the Findings, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on August 7, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 7, 2023 Findings of Fact is **RESCINDED**, and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAL, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 31, 2023

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

**BABAK KHADAMEHBEHNAM
EQUITABLE LAW FIRM APLC
SKEBBA BUECHLER & ORLOV**

TLH/mc

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