

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JOSE DUBON,**

5 *Applicant,*

6 **vs.**

7 **WORLD RESTORATION, INC.; and STATE**
8 **COMPENSATION INSURANCE FUND,**

9 *Defendants.*

Case Nos. ADJ4274323 (ANA 0387677)
ADJ1601669 (ANA 0388466)

OPINION AND ORDER
GRANTING RECONSIDERATION
(EN BANC)

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11 Defendant, State Compensation Insurance Fund (SCIF), has filed a timely petition seeking
12 reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Appeals
13 Board on February 27, 2014. (See *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313
14 (Appeals Board en banc) (*Dubon*).)¹

15 In our February 27, 2014 en banc decision, we rescinded the WCJ's September 23, 2013 Findings
16 and Order, which found that: (1) any dispute over alleged procedural defects in SCIF's utilization review
17 (UR) denial must be resolved through the independent medical review (IMR) process; and
18 (2) therefore, even if SCIF's UR was procedurally defective, the Workers' Compensation Appeals Board
19 (WCAB) cannot decide whether to allow the back surgery recommended by applicant's treating
20 physician.

21 In rescinding the WCJ's decision, our en banc opinion held:

- 22 1. IMR solely resolves disputes over the medical necessity of treatment requests. Issues of
23 timeliness and compliance with statutes and regulations governing UR are legal disputes
24 within the jurisdiction of the WCAB.

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27 ¹ Since the February 27, 2014 en banc decision, there has been a change in the membership of the Appeals Board. Commissioner Moresi is no longer serving as a member and the Governor has appointed Commissioner Zalewski as a member.

2. A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination.
3. If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required.
4. If there is a timely and valid UR, the issue of medical necessity shall be resolved through the IMR process if requested by the employee.

Our en banc opinion concluded that SCIF's UR process suffered from material procedural defects that undermined the integrity of the UR decision. Therefore, we rescinded the WCJ's September 23, 2013 decision and returned the matter to the WCJ for further proceedings and decision on whether the spinal surgery in question is reasonably required.

SCIF is newly aggrieved by our en banc decision so it has properly filed a petition for reconsideration. (Lab. Code, §§ 5900(a), 5903.)² SCIF contends: (1) the provisions of Labor Code section 4610.5, the language of uncodified section 1 of Senate Bill (SB) 863, and the legislative history of SB 863 all unambiguously establish that "any dispute" over a UR decision, including disputes over its timeliness and procedural validity, "shall be" resolved through IMR; (2) even assuming the WCAB has authority over UR timeliness and procedural validity issues, the WCAB should not determine medical necessity; instead, if the WCAB determines that a defendant's UR decision is invalid, the WCAB should simply order that the UR decision cannot be considered by IMR when it determines medical necessity; and (3) it is the responsibility of the treating physician, not the defendant, to provide all documentation in support of a treatment request.

Applicant has filed an answer to SCIF's petition.

² Ordinarily, an Appeals Board decision that rescinds the WCJ's underlying decision and returns the matter to the trial level for further proceedings and decision is not a "final" decision subject to reconsideration. (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (Taylor)* (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774].) However, as discussed in *Dubon* (79 Cal.Comp.Cases at p. 317, fn. 7), our February 27, 2014 en banc decision is a "final" decision because it determined a "threshold" issue. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-1081 [65 Cal.Comp.Cases 650].)

1 Taking into account the statutory time constraints for acting on the petition, and based upon our
2 initial review of the record, we believe reconsideration must be granted in order to allow sufficient
3 opportunity to further study the factual and legal issues in this case. We believe that this action is
4 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned
5 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may
6 hereinafter determine to be appropriate.

7 Pending the issuance of a Decision After Reconsideration, the Appeals Board's February 27,
8 2014 en banc opinion in *Dubon* shall remain in effect and binding. (Lab. Code, § 5910; Cal. Code Regs.,
9 tit. 8, § 10341.)

10 For the foregoing reasons,

11 **IT IS ORDERED** that defendant's petition for reconsideration of the February 27, 2014 Opinion
12 and Decision After Reconsideration (En Banc) is **GRANTED**.

13 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
14 this matter, all further pleadings, correspondence, objections, motions, requests, and communications
15 shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board
16 at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post
17 Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
18 Anaheim District Office or any other district office of the Workers' Compensation Appeals Board and

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1 shall not be e-filed in the Electronic Adjudication Management System (EAMS). Any documents lodged
2 in violation of this order shall neither be accepted for filing nor deemed filed.

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4 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

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6 /s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

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9 /s/ Frank M. Brass
FRANK M. BRASS, Commissioner

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12 /s/ Deidre E. Lowe
DEIDRA E. LOWE, Commissioner

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15 /s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

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18 /s/ Katherine A. Zalewski
KATHERINE A. ZALEWSKI, Commissioner

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

20 5/22/2014

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

23 **JOSE DUBON**
24 **MAURICE ABARR**
25 **STATE COMPENSATION INSURANCE FUND**

26 **NPS/abs**