

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. OAK 0296709**

5 **DEANNA BRASHER,**

6 *Applicant,*

7 **vs.**

8 **OPINION AND DECISION
AFTER RECONSIDERATION**

9 **NATIONWIDE STUDIO FUND; and**
10 **STATE COMPENSATION INSURANCE**
11 **FUND,**

12 *Defendant(s).*

13 We previously granted applicant's petition for reconsideration to further study the factual
14 and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹ Applicant
15 sought reconsideration of the April 18, 2006 Findings of Fact and Order, wherein the workers'
16 compensation administrative law judge ("WCJ") found that defendant's initial objection to the
17 treating physician's request for spinal surgery was timely; that the procedure instituted by the
18 Division of Workers' Compensation ("DWC") Medical Unit, requiring utilization review and
19 appeal from a denial of spinal surgery before the Administrative Director ("AD") selects a second
20 opinion surgeon under Labor Code section 4062(b)², was contemplated by sections 4062 and
21 4610; and that the Medical Unit's referral of the matter for a second opinion was, therefore, timely.
22 The WCJ denied applicant's request for surgery, without prejudice, pending the second opinion.

23 Applicant contended the Medical Unit violated section 4062 when it rejected and failed to
24 act on defendant's initial and timely objection to the treating physician's request for spinal

25
26 ¹ Commissioner Murray, who was on the panel that granted reconsideration, was unavailable for the decision in this matter. Commissioner Rabine was appointed to take her place.

27 ² All further statutory references are to the Labor Code, unless otherwise indicated.

1 surgery; that the Medical Unit lacked authority to require a second request in the form of an appeal
2 from a utilization review denial, before acting on the objection; and that the remedy for the
3 Medical Unit's failure to select a second opinion surgeon within 10 days after receipt of
4 defendant's objection, and for the failure of the second opinion surgeon to issue a report with 45
5 days of the request for surgery, should be that defendant is required to authorize the surgery.

6 We have considered the Petition for Reconsideration and the WCJ's Report and
7 Recommendation on Petition for Reconsideration, and we have reviewed the record in this matter.
8 We have not received an Answer from defendant.

9 For the reasons discussed below, we will reverse the decision of the WCJ and hold that, in
10 response to a treating physician's recommendation for spinal surgery, an employer has the
11 following options: 1) authorize the surgery, 2) object to the surgery, pursuant to section 4062(b),
12 by filing a DWC Form 233 within 10 days of receipt of the doctor's recommendation, 3) submit
13 the recommendation to utilization review, or 4) pursue both options 2 and 3, either simultaneously
14 or by filing an objection after a utilization review denial, meeting the timelines for each process. If
15 the employer denies the surgery pursuant to its utilization review, the employee must object within
16 10 days of receipt by the employee of the employer's denial. The dispute will then be resolved
17 under the second opinion procedures in section 4062(b).

18 In a case such as this, where the defendant has followed the statutory procedures and
19 timelines, and the delay is due solely to the DWC's failure to comply with its obligation under
20 section 4062(b), there is no reasonable basis for terminating the second opinion process. It should
21 be completed, followed by a decision by the WCJ on the merits.

22 **BACKGROUND**

23 The parties stipulated that applicant sustained an industrial injury to her spine on April 22,
24 2002, while employed by defendant as a photographer. The issue of other body parts injured was
25 deferred.

26 Having failed to control applicant's pain with other measures, treating physician Dr. Park
27 requested approval for trial of spinal cord stimulation on February 10, 2006. Defendant referred

1 this request for surgery to utilization review and, on February 17, 2006, denied Dr. Park's request,
2 based on the utilization review report. Copies of the denial letter were sent to applicant and her
3 attorney.

4 Additionally, on February 21, 2006, defendant filed a DWC Form 233 Objection To
5 Treating Physician's Recommendation For Spinal Surgery with the Administrative Director.
6 Applicant does not now dispute the timeliness of defendant's objection.³

7 By letter, dated March 3, 2006, the DWC Medical Unit returned defendant's Form 233
8 objection for the following reason:

9 "Once the Utilization Review process has been completed and the UR has
10 made a determination and does not certify the procedure, the injured
11 worker has to send in their appeal by having his/her treating physician file
12 an appeal if his/her treating physician still wishes to continue with the
13 recommended procedure. **You then have 10 days from receipt of the
14 second request of treating physician's report containing the
15 recommendation for spinal surgery. . .**" (Joint Exhibit 6.) (Emphasis in
16 original.)⁴

17 A copy of this letter was sent to Dr. Park.

18 Dr. Park again requested a spinal cord stimulator trial by letter dated March 3, 2006.
19 Declaring that the second request was received on March 15, 2006, defendant again objected on
20 Form 233 on March 24, 2006, and requested assignment of a second opinion physician by the
21 Administrative Director. On April 4, 2006, the Medical Unit designated Dr. Shortz for the spinal
22 surgery second opinion.

23 Trial was held on April 18, 2006, on the following issues:

24 "1. Applicant's entitlement to a spinal cord stimulator trial;

25 "2 Whether defendant timely objected to the request for spinal surgery

26 ³ Labor Code section 4062(b) requires that an employer's objection to a treating physician's recommendation of spinal
27 surgery be filed within 10 days. At trial, applicant contended that defendant's February 21, 2006 objection to the
February 10, 2006 recommendation was untimely, since it was filed on the 11th day. Because February 20, 2006, was
a holiday, the period in which an objection could be filed was extended to February 21, 2006. (Gov. Code §§6707,
6700-6706; see also, Code Civ. Proc., §§10, 12-12b.)

⁴ The Medical Unit's letter seems to imply that the employee is to object to a utilization review denial by resubmitting
the request for surgery to the employer.

1 such as to trigger the requirement for a second opinion as set forth in
2 Labor Code Section 4062(b);

3 “3. Whether the Division of Workers’ Compensation Medical Unit
4 appropriately followed procedures set forth in Labor Code Sections
5 4062(b) and 4610. What the proper remedy is if DWC fails to follow
6 appropriate procedure. Specifically, applicant is objecting to the Medical
7 Unit requiring a second opinion and extending the 45 days within which to
8 obtain a second surgical opinion by requiring the treating physician to
9 object to an appeal of the UR doctor’s opinion.” (Minutes of Hearing, p.
10 2.)

11 The record does not indicate when or if Dr. Shortz issued his opinion on the requested
12 spinal surgery.

13 DISCUSSION

14 This case presents novel issues regarding the interplay between section 4062, which
15 concerns objections to treating physician recommendations, and the utilization review statute,
16 section 4610, enacted in Senate Bill (“SB”) 228, Stats 2003, ch.639. Section 4062, as amended by
17 SB 228 and by SB 899, effective April 19, 2004, provides, in pertinent part,

18 “(a) If either the employee or employer objects to a medical determination
19 made by the treating physician concerning any medical issues not covered
20 by Section 4060 or 4061 and not subject to Section 4610, the objecting
21 party shall notify the other party in writing of the objection within 20 days
22 of receipt of the report if the employee is represented by an attorney or
23 within 30 days of receipt of the report if the employee is not represented
24 by an attorney. **Employer objections to the treating physician’s
25 recommendation for spinal surgery shall be subject to subdivision (b),
26 and after denial of the physician’s recommendation, in accordance
27 with Section 4610.** If the employee objects to a decision made pursuant
to Section 4610 to modify, delay, or deny a treatment recommendation,
the employee shall notify the employer of the objection in writing within
20 days of receipt of that decision. These time limits may be extended for
good cause or by mutual agreement. If the employee is represented by an
attorney, a medical evaluation to determine the disputed medical issue
shall be obtained as provided in Section 4062.2, and no other medical
evaluation shall be obtained. If the employee is not represented by an
attorney, the employer shall immediately provide the employee with a
form prescribed by the medical director with which to request assignment
of a panel of three qualified medical evaluators, the evaluation shall be
obtained as provided in Section 4062.1, and no other medical evaluation

1 shall be obtained.

2 “(b) The employer may object to a report of the treating physician
3 recommending that spinal surgery be performed within 10 days of the
4 receipt of the report. If the employee is represented by an attorney, the
5 parties shall seek agreement with the other party on a California licensed
6 board-certified or board-eligible orthopedic surgeon or neurosurgeon to
7 prepare a second opinion report resolving the disputed surgical
8 recommendation. If no agreement is reached within 10 days, or if the
9 employee is not represented by an attorney, an orthopedic surgeon or
10 neurosurgeon shall be randomly selected by the administrative director to
11 prepare a second opinion report resolving the disputed surgical
12 recommendation. Examinations shall be scheduled on an expedited basis.
13 The second opinion report shall be served on the parties within 45 days of
14 receipt of the treating physician’s report. If the second opinion report
15 recommends surgery, the employer shall authorize the surgery. If the
16 second opinion report does not recommend surgery, the employer shall
17 file a declaration of readiness to proceed. The employer shall not be liable
18 for medical treatment costs for the disputed surgical procedure, whether
19 through a lien filed with the appeals board or as a self-procured medical
20 expense, or for periods of temporary disability resulting from the surgery,
21 if the disputed surgical procedure is performed prior to the completion of
22 the second opinion process required by this subdivision.” (Emphasis
23 added.)

24 AD Rule 9788.1(a) (Cal. Code Regs., tit. 8, §9788.1(a).) provides,

25 “An employer who objects to the treating physician’s recommendation for
26 spinal surgery shall serve the objection, by mail or other rapid means of
27 delivery, on the Administrative Director, the employee, the employee’s
attorney, if any, and on the treating physician within 10 days of receipt of
the treating physician’s report containing the recommendation. The
objection shall be written on the form prescribed by the Administrative
Director in Section 9788.11 . . .”

28 Rule 9788.11 contains the Form for Employer’s Objection To Report Of Treating Physician
29 Recommending Spinal Surgery, DWC Form 233.

30 Section 4610(g)(3)(A), provides that, if, pursuant to utilization review, a physician’s
31 request for treatment “is not approved in full, disputes shall be resolved in accordance with Section
32 4062. **If a request to perform spinal surgery is denied, disputes shall be resolved in**

1 **accordance with subdivision (b) of Section 4062.”** (Emphasis added.)⁵

2 Section 4062(a) addresses recommendations for spinal surgery in only one sentence:
3 “Employer objections to the treating physician’s recommendation for spinal surgery shall be
4 subject to subdivision (b), and after denial of the physician’s recommendation, in accordance with
5 Section 4610.” This sentence, in combination with the other provisions cited above, establishes
6 two tracks, each leading to the spinal surgery second opinion process in section 4062(b).

7 The first track, the employer’s objection, is simple and direct. The single sentence in
8 section 4062(a) provides that employer objections shall be subject to section 4062(b). Section
9 4062(b) and AD Rule 9788.1 spell out the employer’s and the AD’s responsibilities in resolving
10 spinal surgery disputes: The employer may object on DWC Form 233 within 10 days of receipt of
11 the treating physician’s recommendation. If no agreement is reached with a represented employee
12 on a second opinion surgeon within 10 days, or if the employee is unrepresented, the AD shall
13 randomly select an orthopedic surgeon or neurosurgeon to examine the employee and prepare a
14 report resolving the dispute. In the present case, the employer did object within 10 days. The AD,
15 however, did not follow up with the selection of a second opinion surgeon.

16 The second track, the employee’s objection to a denial of the physician’s recommendation,
17 is more convoluted, and is explained in detail below. In brief, when an employer denies spinal
18 surgery, based upon its utilization review, the employee has 10 days from receipt of that denial to
19 file an objection with the AD. A second opinion surgeon must then be selected pursuant to section
20 4062(b).

21 The employee’s track begins with section 4062(a)’s reference to section 4610 and the
22 denial of the physician’s recommendation, and with the language of section 4610(g)(3)(A). These
23 provisions envision the possibility of utilization review of a recommendation for spinal surgery. If
24 the employer conducts utilization review, and the requested surgery is denied, the employee is then
25 obligated to object under section 4062(a), if he or she still desires the surgery. (See *Willette v. Au*

26 ⁵ Section 4062 refers to the treating physician’s “recommendation” for spinal surgery. Section 4610(g)(3)(A) refers to
27 a “request” to perform spinal surgery. We see no significant difference between the two terms and use them
interchangeably.

1 *Electric Corp.* (2004) 69 Cal.Comp.Cases 1298, 1303 (Appeals Board en banc.) Ordinarily, an
2 applicant would have 20 days to notify the employer of its objection to a utilization review denial,
3 pursuant to section 4062(a); but section 4610(g)(3)(A) specifically provides that disputes
4 regarding denials of spinal surgery be resolved under section 4062(b). Section 4062(b), however,
5 refers only to *employer* objections, which must be made within 10 days. The 20-day period for
6 objecting to a utilization review denial set forth in section 4062(a) is general; it does not refer
7 specifically to spinal surgery requests. Indeed, the only reference to spinal surgery in section
8 4062(a) deals with *employer* objections and says that they shall be subject to subdivision (b).
9 Thus, the only specific reference to *employee* objections to an employer's denial of spinal surgery
10 is the requirement of section 4610(g)(3)(A) that the dispute be resolved under section 4062(b).
11 Given the separate and expedited procedures for spinal surgery and the specific references to
12 section 4062(b) in sections 4062(a) and 4610(g)(3)(A), we believe the time period, within which
13 an applicant must object to a utilization review denial of a request for spinal surgery, is 10 days
14 from receipt of the denial. This time period is parallel to the time for an employer to object and is
15 not likely to pose a hardship, since the treating physician will already have issued the request. No
16 specific format has yet been established for the applicant to object to the denial; but the
17 employee's objection, like the employer's section 4062(b) objection, should be directed to the AD,
18 and not be delayed by going to the employer first and then to the AD, as an attachment to an
19 employer objection to the second request.

20 In this case, defendant pursued option 4, objecting under section 4062(b) and seeking
21 utilization review. Both actions were timely. The Medical Unit failed to act on the initial section
22 4062(b) objection and waited until defendant, acting on its advice, objected a second time, after
23 receiving a second request for surgery from Dr. Park.

24 Section 4062(b) requires that the second opinion report be served on the parties within 45
25 days of receipt of the treating physician's report. The Medical Unit's scheme delays the
26 commencement of this 45 day period until after the treating physician appeals the utilization
27 review denial to the employer. This delay cannot be justified by the statutory language and is an

1 unwarranted obstacle for the employee seeking surgery.

2 Moreover, the procedure contemplated by the Medical Unit overlooks that an employer
3 need not always conduct utilization review. (*Sandhagen v. Cox & Cox Construction* (2005) 70
4 Cal.Comp.Cases 208, 212. (Appeals Board en banc).) It is likely that an employer will bypass
5 utilization review in many cases and simply object under section 4062(b). A reason why an
6 employer might bypass utilization review is that, if an employer undertakes utilization review and
7 the utilization review report concludes that surgery is justified, the dispute over surgery is over.
8 There is no provision for an employer to dispute the utilization review recommendation. At that
9 point, the defendant has lost its right to a second opinion by a “California licensed board-certified
10 or board-eligible orthopedic surgeon or neurosurgeon” under section 4062(b). It must provide the
11 surgery. Rather than be bound by a possible positive recommendation by a utilization review
12 doctor who has not even examined the employee, an employer might well prefer to proceed
13 directly to an examination of the employee by a second opinion surgeon, which is how the dispute
14 will be resolved anyway, in the event of a utilization review denial and employee objection. In
15 addition, utilization review may take up to 14 days from the date of the treatment recommendation.
16 (Lab. Code §4610(g)(1).) If the employer waits for the result of utilization review, and it is not
17 completed within 10 days, the employer will have lost the opportunity to object under section
18 4062(b).

19 If a utilization review report recommends denying surgery, and the employee timely
20 objects, thereby precipitating the second opinion process under section 4610(g)(3)(A), any second
21 opinion process begun as a result of the employer’s objection will also resolve the employee’s
22 objection to the utilization review denial. This situation will arise in cases such as the present one,
23 where the employer both conducts utilization review and objects under section 4062(b).

24 The Medical Unit erred when it rejected and returned defendant’s timely objection and
25 directed defendant to pursue utilization review — a decision which was properly discretionary on
26 defendant’s part. The Medical Unit’s responsibilities under section 4062(b) commenced with
27 defendant’s initial objection, and there was no legal basis for delaying the second opinion process

1 until applicant appealed the utilization review denial.

2 Because defendant did everything the statute required, and even what it was misled to do
3 by the Medical Unit, we will not deny defendant its right to a second opinion, for failure of the
4 Medical Unit or the second opinion surgeon to meet the statutory timelines. We will allow the
5 process to continue, completing the record for the WCJ's determination. As we said in *Willette v.*
6 *Au Electric Corp., supra*, 69 Cal.Comp.Cases 1298, 1309, "in view of the relative newness of the
7 statutory procedure, we will for purposes of this opinion forgive any failure to date to comply with
8 the relevant statutory deadlines and we will not now address any potential consequences of failures
9 to comply with the statutory timelines in the future." We likewise forgive, in this case,
10 applicant's March 3, 2006 objection to the employer's February 17, 2006 denial of surgery — an
11 objection that would otherwise be untimely, pursuant to our decision herein.

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For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 18, 2006 Findings of Fact and Order is **RESCINDED**, and the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ William K. O'Brien

I CONCUR.

/s/ Frank M. Brass

(See Attached Concurring Opinion.)

/s/ Merle C. Rabine

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9/5/2006

***SERVICE BY MAIL ON ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS
RECORD EXCEPT LIEN CLAIMANTS EFFECTED ON ABOVE DATE.***

CB/bea

