

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

**AMY HEYMAN, *Applicant***

**vs.**

**AT&T MOBILITY SERVICES, LLC, permissibly self-insured, *Defendant***

**Adjudication Number: ADJ12171548  
Van Nuys District Office**

**OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration or, alternatively, removal of the Findings of Fact and Order (F&O) issued on January 18, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) the WCJ does not have jurisdiction to determine the needs for home health care as determined by Utilization Reviews (UR) dated August 26, 2022 and September 14, 2022 and the Independent Medical Review Final Determination (IMR) dated November 23, 2022; (2) the parties entered a stipulation to send both the reports of the treating physicians and the home needs assessment to Utilization Review; (3) defendant failed to include the home assessment when the matter was submitted to UR; and (4) the WCJ holds jurisdiction to enforce the terms of the stipulation.

The WCJ ordered that the parties submit Dr. Villanueva's August 18, 2022 report, August 19, 2022 RFA, the home assessment report, and a copy of the F&O to UR.

Applicant contends that the WCJ erroneously failed to find that the September 14, 2022 UR determination of Dr. Falkinstein's August 23, 2022 RFA for home health care was untimely. In the alternative, applicant contends that the WCJ erroneously failed to deem the September 14, 2022 UR determination of Dr. Falkinstein's August 23, 2022 RFA as untimely on the grounds that defendant failed to submit medical documentation required for the UR process. Applicant further contends that the WCJ erroneously failed to find that home health care is reasonably required to cure or relieve applicant from the effects of her injury.

We did not receive an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Removal/Reconsideration (Report) recommending that the Petition be dismissed to the extent that it seeks reconsideration and denied to the extent it seeks removal.

We have reviewed the Petition and the contents of the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will treat the Petition as one for reconsideration and affirm the F&O.

### **FACTUAL BACKGROUND**

In the Report, the WCJ states:

The Applicant sustained a work related back injury on or about 2/9/2019. She underwent low back fusion surgery on 11/19/2019 with the primary treating physician, Dr. Yuri Falkinstein. She also came under the care of the pain management specialist John Villanueva M.D. Dr. Lawrence Richman acts as the AME in neurology. He describes a complication of surgery in the form of either Complex Regional Pain Syndrome or Neurogenic Pain Syndrome (Court's Ex. X).

The Applicant had two adult children in the home and her husband. But in 2021 the husband apparently left the home at which time the need for home health care arose.

There was an RFA dated January 5, 2021 signed by Dr. Falkinstein which simply said "home health." It is unknown just what became of that RFA. The parties seem to agree (if not simply by omission) that it was not received by the Defendant. No UR action is noted.

It seems that Dr. Falkinstein continued to see the patient in 2021. His report of 12/5/2021 indicates that she needs home care and cannot take care of herself (App's Ex. 4). She requires a wheelchair (App's Ex. 5). However the RFA from this report did not mention home health care at all (App's Ex.5).

...

The parties met in conference with Judge Slaten on 6/7/2022 (App's Ex. 6). The parties had not resolved the dispute over the need for home health care. It was agreed that the RFA of 1/5/2021 would be sent in again to UR and that the parties would obtain a home assessment.

...

[T]he agreed upon the home assessment was performed in July 2022 (App's Ex. 9).

...

The testimony from Applicant's counsel on 12/15/2022 supports a finding that the parties indeed agreed that the Home Assessment report would be dispatched to Dr. Villanueva and to UR. The emails from Defendant dated 8/17/2022 (App's Ex. 10) and 9/6/2022 (DF's Ex. D) also support the finding that the parties intended the

home assessment prepared as a result of the 6/7/2022 status conference to be sent to UR and to Dr. Villanueva.

It appears that Dr. Falkinstein . . . issued an RFA . . . dated 8/23/2022 (App's Ex. 13) wherein he recommended home health care "24 hrs/ 7 days/wk". . . .

It also appears that UR issued a denial of the request made by Dr. Falkinstein as well on 9/14/2022 (Df's Ex. F). This UR report shows the receipt of the RFA on 9/8/2022. The RFA from Falkinstein (App's Ex. 13) does not reveal a date or time of transmission.

. . .

Again, it appears that the home health assessment that the parties prepared was not sent to UR in the case of the Falkinstein report . . . Hence neither Dr. Falkinstein nor Dr. Villanueva saw the home assessment prepared by the nurse case manager and, more importantly, UR did not see it either.

. . .

The matter was tried on 12/15/2022. The issues were (1) the jurisdiction of the WCJ to determine the need for home health care, and (2) the need for home health care. (Report, pp. 2-4.)

## DISCUSSION

Applicant filed a Petition for Reconsideration, or in the alternative, a Petition for Removal of the F&O. A petition for reconsideration is the mechanism by which a party may challenge a final order, decision, or award. (Lab. Code § 5900.)<sup>1</sup> A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180, 260 Cal. Rptr. 76; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [163 Cal. Rptr. 750, 45 Cal.Comp.Cases 410, 413]; or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [97 Cal. Rptr. 2d 418, 65 Cal.Comp.Cases 650, 650-651, 655-656].) The Court of Appeal has given examples of threshold issues to include "whether the injury arises out of and in the course of employment, the territorial jurisdiction of the appeals board, the existence of an employment relationship or statute of limitations issues." (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662, 210 Cal. Rptr. 3d 101 (citations omitted.) "Such issues, if finally determined, may avoid the necessity of further litigation." (*Id.*) (internal quotation marks and citations omitted.

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

By contrast, removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal. App. 4th 274, 281, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Here, applicant seeks relief from the WCJ's finding that the UR decision of Dr. Falkinstein's August 23, 2022 RFA was timely, rendering the Appeals Board without jurisdiction to determine whether or not the treatment sought by the RFA is reasonable and necessary to cure or relieve applicant from the effects of her injury. (§ 4600(a).) Since applicant challenges the finding as to jurisdiction, a threshold issue, her Petition is subject to reconsideration and not removal. (*Gaona, supra*, at p. 662.) Accordingly, we will treat the Petition as one for reconsideration.

Employers are required to establish a UR process for treatment requests received from physicians in order to determine whether the treatment sought by the requests is medically necessary. (§ 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 236; see § 4600(a).)

Section 4610 provides time limits within which a UR decision must be made by the employer. (§ 4610 et seq.) These time limits are mandatory. In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that it has jurisdiction to determine whether a UR decision is timely. If a UR decision is untimely, the determination of medical necessity for the treatment requested may be made by the Appeals Board. (*Id.* at p. 1300.) If the UR decision is timely, the Appeals Board has no jurisdiction to address disputes regarding the UR because "[a]ll other disputes regarding a UR decision must be resolved by IMR." (*Id.* at p. 1299.)

Subsequent to *Dubon II*, in a significant panel decision, the Appeals Board held that a UR decision that is timely made, but is not timely communicated, is untimely. (*Bodam v. San Bernardino County/Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519.) In *Bodam*, the

employer did not notify the requesting physician of its UR decision within twenty-four hours and did not send written notice of the UR decision to the physician, applicant or applicant's attorney within two business days after the UR decision was made. (*Id.* at p. 1523.) The UR decision was therefore deemed untimely and the Appeals Board had authority to determine the issue of medical necessity for the disputed treatment.

Turning to applicant's contention that the WCJ erroneously determined that the UR decision of Dr. Falkinstein's August 23, 2022 RFA was timely, we observe that section 4610 provides as relevant:

(i) In determining whether to approve, modify, or deny requests by physicians prior to, retrospectively, or concurrent with the provisions of medical treatment services to employees, all of the following requirements shall be met:

(1) Except for treatment requests made pursuant to the formulary, prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five normal business days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician. . . .

(4) (A) Final decisions to approve, modify, or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision by telephone, facsimile, or, if agreed to by the parties, secure email.

(B) Decisions resulting in modification or denial of all or part of the requested health care service shall be communicated in writing to the employee, and to the physician if the initial communication under subparagraph (A) was by telephone, within 24 hours for concurrent review, or within two normal business days of the decision for prospective review, as prescribed by the administrative director. If the request is modified or denied, disputes shall be resolved in accordance with Section 4610.5, if applicable, or otherwise in accordance with Section 4062.

Here, we agree with the WCJ that since Dr. Falkinstein's August 23, 2022 RFA does not state when it was transmitted, the only evidence as to when it was received is the date of receipt shown on the UR decision itself: September 8, 2022. (Report, p. 3.) Since the UR decision was issued on Wednesday, September 14, 2022, or four business days after the date of receipt, the decision is timely. (*Id.*, pp. 3-4.) It follows that the finding that the WCJ lacks jurisdiction over

the issue of whether the home health care sought by the August 23, 2022 RFA is medically necessary is correct. Accordingly, we are unable to discern merit to applicant's contention that the WCJ erroneously failed to find that the UR decision of Dr. Falkinstein's August 23, 2022 RFA was untimely.

We next address applicant's contention that the WCJ erroneously failed to deem the UR decision of Dr. Falkinstein's August 23, 2022 RFA untimely on the grounds that defendant failed to submit medical documentation required for the UR process. In this regard, we are unaware of any authority, and applicant cites none, for the proposition that a UR decision may be deemed untimely based upon the employer's failure to provide medical documentation necessary for the UR process.

Rather, under *Bodam, supra*, we are authorized to deem a UR decision, though timely, as untimely only where the decision was not communicated to the applicant's physician or attorney within the applicable statutory periods. (*Bodam, supra*, at p. 1523.)

Accordingly, we are unable to discern merit in applicant's contention that the WCJ erroneously failed to deem the UR decision on Dr. Falkinstein's August 23, 2022 RFA as untimely.

Turning to applicant's contention that the WCJ erroneously failed to find that home health care is reasonable and necessary to cure or relieve applicant from the effects of her injury, we have explained that the WCJ lacks jurisdiction to determine that issue. It follows that applicant's contention as raised here is moot. Accordingly, we decline to address the issue of whether or not Dr. Falkinstein's August 23, 2022 RFA for home health care is medically necessary.

Accordingly, we will affirm the F&O.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued on January 18, 2023 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**APRIL 21, 2023**

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

**AMY HEYMAN  
KJT LAW GROUP  
LAW OFFICES OF BREDFELDT, ODUKOYA & HAN**

**SRO/cs**

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