

1 shall affirm the WCR's determination and deny the defendant's Petition for
2 Reconsideration.

3 Applicant sustained an admitted injury to her neck, right shoulder and
4 right upper extremity on March 4, 1996 and over the cumulative period ending
5 March 4, 1996, while employed as a claims examiner.

6 In a January 13, 1997 report, applicant's treating physician, Dr. McClurg,
7 requested authorization from defendant to perform arthroscopic surgery on
8 applicant's right shoulder. On March 25, 1997, applicant filed a request for an
9 expedited hearing, citing defendant's failure to respond to Dr. McClurg's
10 recommendation.

11 When the matter came on for hearing on June 30, 1997, the parties had
12 reached a stipulation authorizing Dr. McClurg to proceed with his recommended
13 right shoulder arthroscopic acromioplasty and Mumford procedure.

14 On October 15, 1997, Dr. McClurg sought authorization to perform a second
15 surgery, an open Mumford's procedure, on applicant's shoulder.

16 On December 1, 1997, applicant again sought an expedited hearing, based
17 upon defendant's refusal to authorize this second surgical procedure
18 recommended by Dr. McClurg. The matter was heard on January 26, 1998.

19 Applicant submitted four reports by Dr. McClurg, in which he set forth the
20 basis for his recommendation for a second arthroscopic surgery on applicant's
21 right shoulder, and in which he responded to the objections received from
22 defendant's non-examining physicians at Physician Authorization Review, Inc.

23 Dr. McClurg states at page 2 of his November 24, 1997 supplemental report:

24 Ms. Czarnecki has well established focal tenderness to the
25 acromioclavicular joint. This has been acknowledged by the
26 independent evaluation of Dr. Schultz which was [a] totally
27 independent and free opinion sought directly by the patient. X-rays
show a good subacromial decompression anteriorly, and a residual
spike on the acromioclavicular joint. It is very difficult to treat this

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patient having opinions that have no direct contact with the patient, and their position is simply to second-guess other doctors without ever having touched the patient. On the personal side, I believe this is unethical behavior. I am hereby once again requesting authorization to perform an open distal clavicle resection as I have been attempting to do for the past several months.

Defendant offered into evidence four reports authored by physicians under the auspices of Physician Authorization Review, Inc. The first report is by Dr. Merritt Quarum, dated October 16, 1997, denying authorization for the Mumford procedure on the grounds that Dr. McClurg “failed to demonstrate any residual impingement or complaints that could be attributed to impingement.”

On November 7, 1997, Dr. Clive Segil, the Corporate Medical Director of Physician Authorization Review, Inc., prepared a review of medical records and concluded that the problem involving her acromioclavical joint may be iatrogenic, meaning ‘physician induced,’ as she had no complaints regarding her acromioclavical joint until Dr. McClurg performed his initial surgery. He advised against surgery until he could review her x-rays and obtain a second evaluation.

When Dr. Segil reviewed applicant’s x-rays, he disputed Dr. McClurg’s finding of “a persistent spica on the superior aspect of the distal clavical.” He further noted that in the independent evaluation by Dr. Schultz, it was recommended that applicant pursue a course of physical therapy prior to returning to the operating room. Dr. Segil indicated his agreement with Dr. Schultz’s recommendation of physical therapy, and recommended against additional surgery.

Defendant also offered into evidence a two and half page publication prepared by the Division of Workers’ Compensation’s presenting answers to questions regarding the implementation of the utilization review process. In a section concerning the relationship between the utilization review process and

1 Labor Code section 4062, the DWC publication states: “Physician review of medical
2 information for purposes of utilization review does not constitute a formal
3 medical evaluation.” It further states “[i]f an insurer denies a request and the
4 physician expresses disagreement in any way within seven days, then the
5 insurer must issue a written explanation of the denial, which will serve as an
6 ‘objection’ pursuant to LC 4062. However, the insurer may invoke LC 4062 at an
7 earlier stage.” (Def. Exh. B. Emphasis added.) In response to a question
8 concerning the role of the WCAB in the utilization review process and the
9 admissibility of utilization review as evidence, DWC states: “Disputes over
10 medical treatment in individual cases will continue to be determined by the
11 WCAB. DWC will work closely with the WCAB, and will conduct training for
12 judges on utilization review issues and the utilization review regulation. Many of
13 the issues related to the impact of the UR process on WCAB determinations will
14 be resolved in the courts or through future legislative clarification.”

15 At the hearing on January 26, 1998, applicant objected to the admission into
16 evidence of the reports authored by Dr. Quarum and Dr. Segil of Physician
17 Authorization Review, Inc., on the grounds that defendant never provided an
18 objection in writing to the treatment recommendations of Dr. McClurg, under
19 Labor Code section 4062. Applicant cited Labor Code section 5703, and stated that
20 she was relying upon the presumption afforded the opinion of the treating
21 physician under Section 4062.9.

22 At the hearing, applicant testified that she received 20 physical therapy
23 treatments between August and September of 1997 and 17 more in December and
24 January, involving range of motion therapy. She requested authorization for the
25 second surgery, noting that the initial procedure relieved the pain in the posterior
26 part of her shoulder but left her with pain on the top of her shoulder. Despite her
27 range of motion physical therapy, her pain has remained the same.

1 The WCR refused to admit defendant's reports into evidence. In his
2 Opinion on Decision of March 6, 1998, the WCR justified the exclusion of the
3 reports authored by Physician Authorization Review by relying on Labor Code
4 section 5703's requirement of a physical examination. Therefore, in the absence
5 of any medical evidence averse to Dr. McClurg's recommended surgical
6 procedure, the WCR awarded this treatment to applicant.

7 Discussion

8 Defendant argues that reports prepared pursuant to the Utilization Review
9 Standards in Rule 9792.6, are admissible, notwithstanding the requirements of
10 Labor Code section 4062 and 5703.

11 Labor Code section 4062 provides a process for obtaining medical
12 evaluations to resolve disputes over "a medical determination made by the
13 treating physician concerning . . . the extent and scope of medical treatment."
14 This process requires the parties to seek to reach agreement upon an Agreed
15 Medical Examiner or failing that, to obtain a Qualified Medical Examination.

16 If a party objects to a treating physician's recommendation, and obtains a
17 QME report, and the other party chooses to rely upon the opinion of the treating
18 physician, Labor Code section 4062.9 provides that "the findings of the treating
19 physician are presumed to be correct. This presumption is rebuttable and may be
20 controverted by a preponderance of medical opinion indicating [a] different level of
21 impairment. However, this presumption shall not apply where both parties select
22 qualified medical examiners."

23 Labor Code section 5703 sets forth the evidence, other than sworn
24 testimony, which the WCAB may receive to prove a fact in dispute; subdivision (a)
25 specifies "Reports of attending or examining physicians" without further
26 definition. Section 10606 of the Rules of Practice and Procedure sets forth an
27 extensive list of factual items which should be included in such a medical report,

1 including “(f) findings on examination.” The single exception in this rule to
2 reports by examining physicians provides that “[i]n death cases, the reports of
3 non-examining physicians may be admitted into evidence in lieu of oral
4 testimony.”

5 Administrative Director’s Rule 9792.6 defines utilization review as follows:

6 (5) ‘Utilization review’ is a system used to manage costs and improve
7 patient care and decision making through case by case assessments
8 of the frequency, duration, level and appropriateness of medical care
9 and services to determine whether medical treatment is or was
10 reasonably required to cure or relieve the effects of the injury.
11 Utilization review includes, but is not limited to, the review of
12 requests for authorization, and the review of bills for medical
13 services for the purpose of determining whether medical services
14 provided were reasonably required to cure or relieve the injury, by
15 either an insurer or a third party acting on an insurer's behalf.

12 Defendant asserts that the utilization review standards were created for the
13 purpose of providing a prompt and effective review of a request for medical
14 treatment without the time consuming delays involved in the AME/QME process
15 required by Labor Code section 4062.

16 Defendant further suggests that as reports obtained to support an
17 employer’s petition for change of treating physician under Rule 9786 do not have
18 to conform to the requirements of Section 5703, it would be anomalous to allow
19 non-examining physician reports to be admitted under Rule 9786, but excluded
20 under Rule 9792.6. Finally, defendant argues that the more general provisions of
21 law in Labor Code sections 4062 and 5703 must yield to the more specific
22 Administrative Director’s Rule 9792.6.

23 We do not believe the existence of the utilization review procedure provides
24 defendant with the authority to circumvent the medical evaluation process
25 required by Statute.

26 Labor Code section 5703 requires that a medical report be authored by a
27 physician who has personally examined an applicant. Under Section 5703

1 reports written by physicians who do not conduct a physical examination of the
2 applicant are not admissible as evidence. (*Sweeny v. Workmen's Comp. Appeals*
3 *Board* (1968) 264 Cal.App.2d 296 [33 Cal. Comp. Cases 404].) Support for the
4 requirement that a physician, whose report is offered as substantial evidence,
5 must conduct a physical examination is further found in Rule 10606, noted above,
6 which specifies the matters to be covered in a physician's written report,
7 including at subsection (f), "the findings on examination."

8 Furthermore, in the DWC publication offered by defendant, it specifically
9 mentions that the receipt of a utilization review report which denies authorization
10 for a recommended treatment constitutes an "objection" for purposes of Labor
11 Code section 4062. This is a recognition of the continued viability of the AME/QME
12 process, rather than authorization to circumvent it. At the point that Dr.
13 Quarum issued his report denying authorization, defendant was required to seek
14 to resolve the dispute by resorting to the AME/QME process, to designate a
15 physician who would examine applicant and prepare an admissible report.

16 Defendant's contention that the utilization review process was intended to
17 avoid the time consuming delays mandated by Section 4062, is not supported by
18 citation to any authority. Indeed, DWC's publication on this issue indicates that
19 complying with the AME/QME process is still required. It is beyond the
20 Administrative Director's authority to create, by regulation, an exception to the
21 statutory requirement in Section 4062. Defendant has offered no support for its
22 contention that a regulation issued by the Administrative Director may take
23 precedence over a provision of the Labor Code.

24 The rule of construction cited by defendant is not applicable where the more
25 specific rule is a regulation rather than a statute. Code of Civil Procedure section
26 1859 directs that "[i]n the construction of a statute the intention of the legislature
27 ... is to be pursued, if possible; and when a general and particular provision are

1 inconsistent, the latter is paramount to the former.” Consequently, “where the
2 same subject matter is covered by inconsistent provisions, one of which is special
3 and the other general, the special one, whether or not enacted first, is an
4 exception to the general statute and controls unless an intent to the contrary
5 clearly appears.” (*Warne v. Harkness* (1963) 60 Cal. 2d 579, 588.) This rule of
6 construction however cannot apply here, as the Administrative Director’s Rule
7 does not have the same legal standing as an enactment of the legislature. Labor
8 Code section 139(e)(8), which requires the Administrative Director to “adopt model
9 utilization protocols in order to provide utilization review standards,” does not
10 specifically authorize the issuance of a rule which overrides the statutory
11 mandate of Labor Code section 4062. We shall not, therefore, give this rule the
12 preemptive effect sought by defendant.

13 Accordingly, we shall affirm the WCR’s decision to exclude the medical
14 evidence offered by defendant and award applicant the medical treatment
15 recommended by Dr. McClurg. Dr. McClurg’s opinion is substantial evidence
16 upon which the WCR properly relied to determine applicant was in need of
17 additional surgery to cure or relieve the effects of her industrial injury.

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For the foregoing reasons,

IT IS ORDERED that, as our Decision After Reconsideration, the Findings and Award, issued March 6, 1998 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Robert N. Ruggles

I CONCUR,

/s/ Colleen S. Casey

/s/ Douglas M. Moore, Jr.

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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