

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

KATHLEEN BAKER, *Applicant*

vs.

COUNTY OF SACRAMENTO, *permissibly self-insured, Defendants*

**Adjudication Number: ADJ8969933
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 1, 2020.¹ By the F&A, the WCJ found that the evidence did not establish that the June 10, 2020 utilization review (UR) decision was properly communicated to the doctor. The WCJ further found that defendant knew or should have known that the intended surgical level was L4-5 and should have requested a UR decision prior to June 10, 2020. Defendant's failure to do so was found to render it responsible for the costs of the surgery.

Defendant contends that the WCJ does not have the authority to make a finding regarding medical necessity contrary to the independent medical review (IMR) determination. Defendant also contends that it was improper for the WCJ to impute defendant with knowledge of the correct spinal level for the recommended surgery.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

¹ The F&A is dated November 30, 2020, but was not served until December 1, 2020.

FACTUAL BACKGROUND

Applicant claims injury to her low back and psyche on March 14, 2011 while employed as a dispatcher by the County of Sacramento. Defendant has accepted compensability for the low back and provided some treatment. (Minutes of Hearing and Summary of Evidence, October 28, 2020, p. 2.)

Philip Orisek, M.D. provides treatment to applicant as her primary treating physician (PTP). In his April 8, 2020 report, Dr. Orisek stated as follows in relevant part:

She has had a little bit of relief but nothing dramatic so far. She is interested in definitive options and stabilization of the unstable L4-5 level is the best solution. We will try to resubmit for the surgery. The patient had all questions answered at this point in time.

(Applicant's Exhibit No. 13, Report from Philip Orisek, M.D., April 8, 2020, p. 1.)

On April 21, 2020, Dr. Orisek submitted a request for authorization (RFA) for "L5-S1 Anterior/Posterior Fusion with Instrumentation" and other treatment modalities. (Applicant's Exhibit No. 14, Report from Philip Orisek, M.D., April 21, 2020, exh. p. 1.) On April 29, 2020, UR approved the recommended surgery at "L5-S1" and the other treatment modalities with the exception of the bone growth stimulator. (Applicant's Exhibit No. 28, Utilization review, April 29, 2020, p. 1.)

Dr. Orisek saw applicant on June 3, 2020 for her "preoperative appointment for L4-5 fusion." (Applicant's Exhibit No. 16, Report from Philip Orisek, M.D., June 3, 2020, p. 1.) An addendum from Dr. Orisek's office dated June 4, 2020 states:

Left message for adjuster:

We need to revise the surgery procedure approved from L5-S1 A/Pfusion to L4-5 XLIF/PFWI./sdk

(Applicant's Exhibit No. 17, Report from Philip Orisek, M.D., June 4, 2020.)

On June 10, 2020, Daisy Yang from Dr. Orisek's office sent the following email to the claims adjuster, Tamara Bakkie:

Our patient K. Baker (Claim#W117413-0337) is scheduled for surgery tomorrow. Her authorization letter states the procedure as "LS-S1

Anterior/Posterior Fusion w/ Instrumentation”. The name of the surgery has changed but the codes are still the same. Would you be able to change the authorization to list the procedure as “L4-S Extreme Lateral Interbody Fusion/Posterior Fusion w/ Instrumentation” instead? If not, can you direct me to who I need to speak to in order to get this changed. Mrs. Baker’s surgery is tomorrow at 11:30AM. Thank you.

(Defendant’s Exhibit E, E-mail string Re Surgery Authorization from Tamara Bakkie sent at 9:32 a.m., June 15, 2020, exh. p. 4.)

Ms. Bakkie responded by email with a request for an updated RFA. (*Id.*) Ms. Yang submitted a revised RFA in response. (*Id.* at p. 3.) Ms. Bakkie emailed back that she was trying to get “a decision today” and reported to Ms. Yang the following response from UR:

I have submitted this case with the updated information to Peer Review to review for medical necessity due for today. You should let the surgeon’s office know that the decision can be 50/50 since it a different procedure from the previous RFA submitted due to different spine level being operated on. I will keep an eye out for this request and submit and inform you as soon as it is completed.

(*Id.*)

The following day, Ms. Yang emailed Ms. Bakkie at 8:04 a.m. stating: “We did not get a call back last night and I do not see anything in the faxes for Mrs. Baker. Her surgery is today at 11:30AM. Please let me know as soon as you hear anything.” (*Id.* at p. 2.) Ms. Bakkie emailed back at 8:14 a.m.: “I asked for an update at 730 this morning. I was told it was sent to peer to peer and they are still working on it. I just followed up again letting them know that surgery is today at 1130 and asking them to work on it now.” (*Id.*)

UR issued a denial for an “L4-5 Extreme Lateral Interbody Fusion (XLIF), Posterior Fusion w/Instrumentation” and related treatment modalities dated June 10, 2020. (Applicant’s Exhibit No. 29, Utilization review decision, June 10, 2020, p. 1.) The UR decision states that the request was received on the same date that the decision issued. (*Id.*) The UR decision also notes a “successful peer-to-peer call with Philip J. Orisek, MD was made...The details of the request were discussed and the results of that discussion are documented below. As per MD, the patient is having symptoms stemming from pathology at the L4/5 level with instability and spondylolisthesis on X-ray. The patient has failed therapy, medication, and pain management.” (*Id.*) The decision indicates that it was faxed to Dr. Orisek with a “cc” to applicant and her attorney. (*Id.* at pp. 1 and 10.)

Dr. Orisek performed surgery on the L4-5 level on June 11, 2020. (Applicant's Exhibit No. 26, Report of Michael Ridgeway, M.D., August 8, 2020, exh. p. 3.)

Applicant submitted a request for IMR of the June 10, 2020 UR decision. On July 20, 2020, IMR issued a determination letter upholding the UR decision. (Applicant's Exhibit No. 27, Independent Medical Review decision, July 20, 2020.) Applicant timely appealed the IMR determination pursuant to Labor Code² section 4610.6(h). (Lab. Code, § 4610.6(h); Applicant's Exhibit No. 9, Petition for Order Vacating IMR Determination, August 4, 2020.)

The matter proceeded to trial on October 28, 2020 on the following issues:

1. Applicant's appeal from a decision by Independent Medical Review.

Applicant claims the utilization review decision of April 29, 2020, should be interpreted as approving surgery at the L4-5 level instead of L5-S1.

(Minutes of Hearing and Summary of Evidence, October 28, 2020, p. 2.)

There was one witness at trial, Susan Kort, whose testimony was summarized as follows:

She works for Dr. Orisek as the surgery coordinator. She worked with Daisy Yang, who left their office two to three months ago.

She knows the applicant as a patient, and she originally tried to schedule surgery for the applicant at the level of L5-S1 on January 29, 2019. Daisy Yang submitted a request for authorization at that time based on their presurgery checklist. Workers' compensation did not authorize the surgery at that point. After that time, the applicant continued to be seen as a patient and had injections at the level of L4-5, which were helpful.

On April 20, Dr. Orisek made a request of surgery to be done at that level, but due to lack of a presurgery checklist, the request went out requesting surgery at the level of L5-S1. That was an error. All the prior notes before that request referenced the level of L4-5. The employer had actually authorized the surgery request, and the witness scheduled the applicant for surgery at the level of L4-5. Later on Philip Lanum noticed the error in the levels and called the adjuster. Daisy Yang then submitted an emergency request for review of surgery at the L4-5 level.

After the emergency request, the witness knows that the doctor had a peer review call. The surgery went forward the next day, which was June 11, 2020. She found out that the surgical procedure was actually denied authorization based on

² All further statutory references are to the Labor Code unless otherwise stated.

the denial letter of June 11, 2020. She does not know if Dr. Orisek knew that the request for the surgery that was done had been denied.

(Minutes of Hearing and Summary of Evidence, October 28, 2020, p. 5.)

The WCJ issued the resulting F&A, wherein he found that the “evidence does not establish that the U.R. decision was properly communicated to Dr. Orisek so he went ahead and operated on applicant on June 11, 2020, at the L4-5 level.” (F&A, December 1, 2020, p. 2.) The WCJ also found that the IMR determination “was based on medical expertise, and so is not subject to reversal on IMR appeal.” (*Id.*) It was found that defendant “knew or should have known that the intended surgical level was L4-5 prior to June 10, 2020, and if it intended to seek a new U.R. should have requested one before that date.” (*Id.*) Since defendant did not communicate its UR decision before June 10, 2020, the WCJ found that “it is responsible for all costs of the surgery.” (*Id.*) An award was made to applicant for the surgery she underwent on June 11, 2020.

DISCUSSION

The employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.) Employers are further required to conduct UR of treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 236.) Section 4610.5 mandates IMR for “[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.” (Lab. Code, § 4610.5(a)(2); see also Lab. Code, § 4062(b) [an employee’s objection to a UR decision to modify, delay or deny an RFA for a treatment recommendation must be resolved through IMR].)

Section 4610 provides time limits within which a UR decision must be made by the employer. (Lab. Code, § 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.)

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the Administrative Director (AD). The section explicitly provides that the AD's determination is presumed to be correct and may only be set aside by clear and convincing evidence of one or more of the following: (1) the AD acted without or in excess of his or her powers, (2) the AD's determination was procured by fraud, (3) the independent medical reviewer had a material conflict of interest, (4) the determination was the result of bias based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (Lab. Code, § 4610.6(h).)

In her appeal of the IMR decision, applicant argues that the June 10, 2020 UR decision and corresponding IMR decision are "faulty" because they are inconsistent with the April 29, 2020 UR decision. (Applicant Exhibit No. 9, Petition for Order Vacating IMR Determination, August 4, 2020, p. 6.) This is not a basis to appeal an IMR determination under section 4610.6(h). Therefore, we agree with the WCJ that applicant has not established by clear and convincing evidence a valid basis for appeal of the IMR determination in accordance with the Labor Code.

The only other issue identified at trial was applicant's assertion that the April 29, 2020 UR decision "should be interpreted as approving surgery at the L4-5 level instead of L5-S1." We are unaware of any legal authority permitting the Appeals Board to interpret a UR decision as approving treatment different than what is reflected in the UR and RFA, and applicant did not cite any authority in support of this contention. As stated above, the Appeals Board's jurisdiction is limited to determining the timeliness of the UR decision.

The F&A includes findings of fact regarding whether the June 10, 2020 UR decision was timely communicated. It is acknowledged that a UR decision must be timely made and communicated. (See *Dubon II, supra*; *Bodam v. San Bernardino County/Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519.)³ However, the timeliness of the second UR decision was not one of the issues identified for adjudication at trial. All parties to a workers' compensation

³ Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Due process requires, in relevant part, that a party receive notice and an opportunity to be heard before an action adverse to its interest is taken. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) As stated by the Court of Appeal in *Pinkney*:

A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se.

(*Pinkney, supra*, at p. 806, citations omitted.)

The F&A improperly addressed issues that were not submitted for adjudication. This violated defendant's right to due process.

The WCJ concluded in the F&A that defendant "knew or should have known that the intended surgical level was L4-5 prior to June 10, 2020." We disagree that an inference about what defendant "should have known" about the recommended treatment confers jurisdiction on the Appeals Board to award treatment non-certified by a UR decision that was upheld by IMR. As stated above, the Appeals Board's jurisdiction regarding a disputed UR decision is restricted to whether the decision was timely. (*Dubon II, supra*.) In the event the June 10, 2020 UR decision was timely made (and timely communicated), the Appeals Board has no jurisdiction to address the necessity of the disputed medical treatment and applicant's sole remedy to dispute the UR decision was through IMR and the process to appeal IMR per section 4610.6(h).

If, upon return of this matter to the trial level, the trier of fact determines that the June 10, 2020 UR decision was untimely, then he may address whether the disputed treatment was reasonably required to cure or relieve from the effects of applicant’s injury. (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1312 [“where a defendant’s UR decision was untimely, the injured employee is nevertheless entitled only to ‘reasonably required’ medical treatment (§ 4600(a)) and it is the employee’s burden to establish his or her entitlement to any particular treatment (§§ 3202.5, 5705), including showing either that the treatment falls within the presumptively correct MTUS or that this presumption has been rebutted. (§ 4604.5; see also § 5307.27.)”]; see also *Sandhagen, supra*, 44 Cal.4th at p. 242.)

Therefore, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on December 1, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 29, 2021

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

HANNA, BROPHY, MACLEAN, MCALLER & JENSEN

KATHLEEN BAKER

MARCUS, REGALADO, MARCUS & PULLEY

AI/pc

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

CS