WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SANDRA CEJA, ***Applicant***

vs.

TAYLOR FARMS PACIFIC; ARCH INSURANCE CO., ***Defendants***

Adjudication Number: ADJ11862779
Stockton 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.

Applicant seeks reconsideration of the Findings of Fact, Award, Order and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 13, 2020. By the F&O, the WCJ found that defendant's utilization review (UR) decision was untimely. The WCJ further found that applicant did not establish that the requested treatment is medically necessary.

Applicant contends that the evidence establishes that the right knee surgery is reasonable and necessary treatment.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration 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 affirm the F&O.

FACTUAL BACKGROUND

Applicant claims injury to the bilateral knees and right hip on November 20, 2016 while employed as a laborer by Taylor Farms Pacific. Defendant has accepted the right knee as compensable. (Minutes of Hearing and Summary of Evidence, February 11, 2020, p. 2.)

Jeff Jones, M.D., provides treatment to applicant as her primary treating physician (PTP). Dr. Jones referred applicant to David Jupina, M.D., an orthopedic surgeon, for evaluation and treatment. (Defendant's Exhibit B, Report of Dr. Jones, October 24, 2019, exh. p. 4.)

Dr. Jupina issued several reports regarding applicant from September to November of 2019. (Defendant's Exhibit A, Four reports from Dr. Jupina, September 6, 2019, September 17, 2019, October 8, 2019 and October 18, 2019; Joint Exhibit No. 3, Report from Dr. Jupina, November 15, 2019.) In his November 15, 2019 report, Dr. Jupina stated as follows in relevant part:

> It was discussed in detail with Sandra that she can consider having a repeat knee arthroscopy, but it is not guaranteed that it will be successful because the previous one did not help much. She is currently off work and will need to obtain clearance from her PTP, Dr. Jones. Follow up with occur pending surgery. The patient is agreeable.
>
> (Joint Exhibit No. 3, Report from Dr. Jupina, November 15, 2019.)

Dr. Jupina recommended a right knee arthroscopy with partial medial menisectomy in his report.

A request for authorization (RFA) dated November 19, 2019 recommending the knee arthroscopy was submitted to defendant. (Joint Exhibit No. 1, RFA, November 19, 2019.) Defendant issued a UR decision dated November 22, 2019 non-certifying the RFA for surgery and related treatment. (Joint Exhibit No. 2, Utilization Review decision, November 22, 2019.) The UR decision was served on Dr. Jupina and applicant, but was not served on applicant's attorney. (*Id.* at p. 8.)

The matter proceeded to trial on February 11, 2020. The parties stipulated at trial that the November 22, 2019 UR decision was not served on applicant's attorney. (Minutes of Hearing and Summary of Evidence, February 11, 2020, p. 2.) The disputed issues included:

> 1. Whether the 11/21, 11/22 Utilization Review Decision is valid, as it was not served on the applicant's attorney.
>
> 2. Depending on the finding of No. 1, whether the treatment requested by Dr. Jupina, a right knee arthroscopy, is medically necessary.
>
> (*Id.*)

In the resulting F&O, the WCJ found that the failure to serve the UR decision on applicant's attorney rendered it untimely. The WCJ further found that applicant has not established that the requested treatment is medically necessary.

DISCUSSION

I.

Labor Code section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).)[1] Employers are required to establish a UR process for treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.)

At the time of the November 22, 2019 UR decision, former section 4610(i) provided as follows for communication of UR decisions as relevant herein:

> (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.
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> (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 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.
>
> (Former Lab. Code, § 4610(i)(4)(A)-(B), amended by Stats. 2019, ch. 647, § 6, eff. Jan. 1, 2020.)

Administrative Director (AD) Rule 9792.9.1 further provides in pertinent part:

> (e) (3) For prospective, concurrent, or expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by

[1] All further statutory references are to the Labor Code unless otherwise stated.

> telephone shall be followed by written notice to the requesting physician, the injured worker, **and if the injured worker is represented by counsel, the injured worker's attorney** within 24 hours of the decision for concurrent review and within two (2) business days for prospective review and for expedited review within 72 hours of receipt of the request.
> …
> (Cal. Code Regs., tit. 8, § 9792.9.1(e)(3), emphasis added.)

In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298, 1299 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that if a UR decision is untimely, the UR decision is invalid and not subject to independent medical review (IMR). The *Dubon II* decision further held that the Appeals Board has jurisdiction to determine whether a UR decision is timely. (*Id.*) 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.) However, "where a UR decision is timely, IMR is the sole vehicle for reviewing the UR physician's expert opinion regarding the medical necessity of a proposed treatment." (*Id.* at pp. 1310-1311; see also Lab. Code, §§ 4062(b), 4610.5.)

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.)[2] In *Bodam*, the employer did not notify the requesting physician of its UR decision within 24 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.)[3] The UR decision was therefore deemed untimely and the Appeals Board had authority to determine the issue of medical necessity for the disputed treatment.

The parties stipulated that the November 22, 2019 UR decision was not served on applicant's attorney. This stipulation is supported by the evidence. Therefore, pursuant to the

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[2] 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).)

[3] It is noted that section 4610 and AD Rule 9792.9.1(e)(3) contained different language regarding communication of a UR decision when the UR decision issued in *Bodam*. (*Bodam*, *supra*, 79 Cal.Comp.Cases at p. 1522.) However, the principles outlined in *Bodam* remain applicable to this matter.

discussion above, the UR decision was not timely communicated and was untimely.

We therefore agree with the WCJ's conclusion regarding the timeliness of the UR decision.

II.

"[W]here 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.)." (*Dubon II*, *supra*, 79 Cal.Comp.Cases at p. 1312; see also *Sandhagen*, *supra*, 44 Cal.4th at p. 242 [the employee bears the burden of proving treatment is reasonable and necessary by "demonstrating that the treatment request is consistent with the uniform guidelines (*§ 4600, subd. (b)*) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (*§ 4604.5*)"].) Applicant therefore bears the burden of showing entitlement to the disputed treatment based on substantial medical evidence. (*Dubon II*, *supra*, 79 Cal.Comp.Cases at p. 1312; see also Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310] [decisions of the Appeals Board must be supported by substantial evidence].)

Pursuant to section 4600(b), "medical treatment that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27." (Lab. Code, § 4600(b); see also Lab. Code, § 4610.5(c)(2) [defining "medically necessary" and "medical necessity" as treatment based on certain standards].) Section 5307.27 specifies that these guidelines are the medical treatment utilization schedule (MTUS). (Lab. Code, § 5307.27(a); see also Cal. Code Regs., tit. 8, § 9792.20 et seq.) The MTUS is presumptively correct on the extent and scope of treatment, and is the primary source of guidance for physicians. (Lab. Code, § 4604.5(a); Cal. Code Regs., tit. 8, § 9792.21(c).) The MTUS may be rebutted and treatment may be warranted based on recommendations outside the MTUS in limited situations. (Cal. Code Regs., tit. 8, § 9792.21(d); see also Lab. Code, § 4604.5(d).)

Dr. Jupina's reports do not include citations to the MTUS or other evidence-based treatment guidelines pursuant to section 5307.27 in support of the need for the requested knee surgery. The limited discussion of the surgery in his reports primarily summarizes his

conversations with applicant regarding the surgery. There are no other medical reports in the record supporting the need for surgery.[4]

With respect to the dissent's analysis, the duty to develop the record must be balanced with the parties' obligation to exercise due diligence to complete necessary discovery. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986]; see also Lab. Code, § 5502(d).) As discussed above, applicant bears the burden of proving the necessity of disputed treatment, for which she had an opportunity to obtain and provide evidence to the trier of fact at trial. She failed to meet that burden based on the evidence admitted at trial.

Therefore, we will affirm the F&O.

[4] The record includes a report from the qualified medical evaluator (QME), Michael Sinel, M.D., wherein he endorses a *consultation* for further surgery, but not the surgery itself. (Applicant's Exhibit No. 2, QME Report from Dr. Sinel, April 18, 2019, p. 18.) In any event, Dr. Sinel as the QME is prohibited from commenting on any disputed medical treatment issue. (Cal. Code Regs., tit. 8, § 35.5(g)(2).) Consequently, his report was not considered in evaluating the record regarding the medical necessity of this treatment.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order and Opinion on Decision issued by the WCJ on February 13, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR AND DISSENT. (See Attached Dissenting Opinion.)

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2021

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

COLANTONI COLLINS MARREN PHILLIPS & TULK
OCCUPATIONAL INJURY LAW CENTER
SANDRA CEJA

AI/*pc*

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

CONCURRING AND DISSENTING OPINION OF COMMISSIONER SNELLINGS

I respectfully concur and dissent. I agree with the majority that the UR decision was untimely per section I of the decision. However, I would amend the F&O to find that further development of the record is necessary to determine medical necessity of the knee surgery and defer this issue pending development of the record.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

There is no dispute that defendant's UR decision was invalid because it was untimely communicated. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298, 1299 (Appeals Board en banc) (*Dubon II*); *Bodam v. San Bernardino County/Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519, 1521.) The Appeals Board thus has jurisdiction to address medical necessity of the recommended knee surgery. There is evidence in the record supporting the need for the recommended surgery, although Dr. Jupina does not cite to the MTUS or other evidence-based guidelines in the reports in evidence. In lieu of denying applicant treatment that may be medically necessary and reasonable to cure or relieve from the efforts of the injury, the Appeals Board should obtain additional evidence regarding whether the surgery must be provided on an industrial basis.

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) The proper method to develop the record is thus for the parties to return to the physicians who

have already reported in this case, which in this matter would include applicant's treating physicians.

I would therefore affirm the findings of fact regarding the timeliness of the UR decision, but amend the F&O to defer the issue of medical necessity of the knee surgery pending further development of the record.

Therefore, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2021

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COLANTONI COLLINS MARREN PHILLIPS & TULK
OCCUPATIONAL INJURY LAW CENTER
SANDRA CEJA

AI/*pc*

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