WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIE GARTZ, *Applicant*

vs.

UNITED CONTINENTAL HOLDINGS, INC., permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ15516233
San Francisco District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the May 5, 2025 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found, as stipulated by the parties, that applicant sustained a specific injury of August 12, 2021 to the bilateral wrists, bilateral shoulders, neck, bilateral elbows arising out of and in the course of employment by permissibly self-insured employer United Continental Holdings as a customer service representative. The WCJ also found that the February 24, 2025 report of primary treating physician (PTP) Timothy Lo, M.D., did not document a change of material facts and does not constitute substantial evidence in support of his February 24, 2025 Request for Authorization (RFA) of a functional restoration program. The WCJ further found that Utilization Review (UR) of Dr. Lo's February 24, 2025 RFA was not required, and that the WCAB has no jurisdiction to determine the medical necessity of the functional restoration program requested in that RFA.

Applicant's Petition for Reconsideration contends that defendant has unreasonably delayed treatment by failing to respond timely to the first RFA and by failing to submit the second RFA to UR. The Petition also contends that defendant is subject to penalties. The Petition further contends that the WCJ erred in finding that defendant did not need to submit the second RFA to UR, and that the WCAB has jurisdiction to address the medical treatment dispute based on a change of circumstances shown by records of applicant's treatment, specifically applicant's completion of physical therapy, a cognitive behavioral therapy (CBT) session, and psychotherapy.

Defendant filed a timely Answer to the Petition, which contends that the WCJ did not err in her findings. The Answer also points out that the issue of penalties is not a proper subject for reconsideration, because it was neither raised at the expedited hearing nor addressed in the WCJ's Findings. The Answer concedes that Dr. Lo's first RFA was received by defendant on November 27, 2024, and that defendant responded to the RFA with a conditional non-certification through its UR provider, Genex, on December 10, 2024. The Answer also indicates that Genex issued an appeal review on December 18, 2024, which also non-certified the requested functional restoration program "because the applicant does not have significant functional deficits that leave her incapacitated and the applicant is retired and does not plan to return to work."

The WCJ issued a Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

We have considered the Petition for Reconsideration and the Answer and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

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

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on June 4, 2025, and 60 days from the date of transmission is Sunday, August 3, 2025. The next business day that is 60 days from the date of transmission is Monday, August 4, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, August 4, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the WCJ, the Report was served on June 4, 2025, and the case was transmitted to the Appeals Board on June 4, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 4, 2025.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

The Minutes of April 28, 2025 show that only two issues were submitted to the WCJ at expedited hearing, based on six exhibits and no testimony. The issues submitted for decision were:

> 1. Does the WCAB have jurisdiction over the treatment requested in the February 24, 2025 Request for Authorization?
>
> 2. Is the treatment in the February 24, 2025 Request for Authorizaton medically necessary?

(Minutes of Expedited Hearing dated April 28, 2025, page 2, lines 22-28.)

To decide these two issues, the parties provided two joint exhibits, and defendant provided four exhibits, all of which were admitted into evidence. (*Id*., page 2, line 38 to page 3, line 25.)

Admitted as Defendant's Exhibit A was the November 27, 2024 RFA and supporting report of Timothy Lo, M.D., seeking authorization for 80 hours of an inpatient functional restoration program. (*Id*., page 3, lines 3-6; Defendant's Exhibit A, RFA and Report of Timothy Lo, M.D., dated November 27, 2024, pages 1-34.)

A UR determination from Genex dated December 10, 2024 was admitted as Defendant's Exhibit B. (Minutes of Expedited Hearing dated April 28, 2025, page 3, lines 8-11.) The UR determination conditionally non-certified the RFA, which was received by United Continental Holdings, Inc. on November 27, 2024 and by Genex on December 4, 2024, based on Dr. Lo's lack of response to a request for additional information. (Defendant's Exhibit B, Genex UR Decision dated December 10, 2024, pages 1-2.) The UR determination does not specify when or how this request was made.

Admitted as Defendant's Exhibit C was a UR determination from Genex dated December 18, 2024. (Minutes of Expedited Hearing dated April 28, 2025, page 3, lines 13-16.) After the receipt of additional information on an unspecified date, Genex non-certified the requested functional restoration program based on the following grounds:

> At this time, it appears that an FRP is not indicated. Guidelines state that the claimant should remain significantly incapacitated despite attempting less costly interventions before warranting a functional restoration program. The claimant has neck and upper back pain with 4/5 strength with right grip strength and thumb abduction, and positive right Finkelstein's test, depression, anxiety, panic, fear-avoidance beliefs, fear of re-injury, and sleep disturbances. While it is appreciated that the claimant has continued chronic pain and functional deficits[, t]he claimant does not have significant functional deficits that leave the claimant incapacitated. Also, the claimant is retired and does not plan to

> return to work. Therefore, the prospective request for 1 CARF Accredited Northern California Functional Restoration Program 80 hours to include overnight stay is non-certified.

(Defendant's Exhibit C, Genex UR Determination dated December 18, 2024, page 2, paragraph 4.)

Admitted as Defendant's D was an Independent Medical Review (IMR) determination dated January 30, 2025. (Minutes of Expedited Hearing dated April 28, 2025, page 3, lines 18-21.) The IMR determination upheld the UR determination dated December 18, 2024. (Defendant's D, IMR Determination dated January 30, 2025, pages 1-4.)

Dr. Lo's RFA and report dated February 24, 2025, indicating that it is a resubmission of the request for authorization for the same 80-hour functional restoration program, and representing that there has been a change in material facts, was admitted as Joint Exhibit 101. (Minutes of Expedited Hearing dated April 28, 2025, page 2, lines 40-43; Joint Exhibit 101, RFA and Report of Timothy Lo, M.D., dated February 24, 2025, page 1.) A letter from Genex dated February 27, 2025, indicating cancellation of utilization review at the request of its client, was admitted as Joint Exhibit 102. (Minutes of Expedited Hearing dated April 28, 2025, page 2, lines 45-47; Joint Exhibit 102, Genex UR Decision dated February 27, 2025, page 1.)

At trial, the parties stipulated that applicant, while employed by defendant on August 12, 2021 as a customer service rep, sustained injury arising out of and in the course of employment to the bilateral wrists, bilateral shoulders, neck, bilateral elbows, and claims to have sustained injury to the bilateral thumbs. (Minutes of Expedited Hearing dated April 28, 2025, page 2, lines 6-14.) The parties further stipulated that at the time of injury, the employer was permissibly self-insured for workers' compensation purposes, the employer has furnished some medical treatment, and the PTP is Dr. Timothy Lo. (*Id*., page 2, lines 16-20.)

After submission of issues at the expedited hearing, the WCJ issued Findings and an Opinion on Decision dated May 5, 2025. In relevant part, the Findings were:

> 3. The February 24, 2025 report of Timothy Lo, M.D. did not document a change of material facts and does not constitute substantial evidence in support of his February 24, 2025 Request for Authorization.
>
> 4. Utilization Review of the February 24, 2025 Report for Authorization from Timothy Lo, M.D. was not required.

5. There is no jurisdiction to determine the medical necessity of the Functional Restoration Program requested by Timothy Lo, M.D.

According to the Opinion on Decision, the parties are in agreement that a previous RFA dated November 27, 2024, also seeking authorization of a functional restoration program, was timely denied and upheld by IMR. (Opinion on Decision dated May 5, 2025, page 4, second paragraph.) The timeliness of the response to the first RFA of November 27, 2024 does not appear to be addressed in any of the parties' stipulations at hearing on April 28, 2025, and is called into question by the Petition.

The Opinion on Decision offered the following analysis:

> Utilization Review ("UR") is used to "approve, modify, or deny, in whole or in part" treatment recommendations made by the treating physicians. (Labor Code section 4610(a).) A decision to approve, modify or deny prospective treatment requests are to be made within 5 business days from the receipt of the request for authorization ("RFA.") (Labor Code section 4610(i)(1).) In the absence of a timely UR decision, the WCAB has jurisdiction to determine if the medical treatment requested on the RFA is reasonable and necessary. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (*Dubon II*).)
>
> A utilization review denial remains in effect for 12 months from the date of decision for that same treatment unless further recommendations the treatment is documented by a change of facts material to the basis of the utilization review decision. Labor code section 4610 (k).
>
> Dr. Lo originally requested authorization for 80 hours of participation in a Functional Restoration Program ("FRP") in a November 27, 2024 request for authorization with an accompanying report. (Exhibit A.) The parties are in agreement that the RFA was timely denied by utilization review. (Exhibit B) IMR subsequently upheld that denial. (Exhibit D.)
>
> Dr. Lo submitted a new request for authorization for the 80 hours of participation in an FRP with a new request for authorization dated February 24, 20025. The RFA did check the box at top to indicate that it was a resubmission for change of material facts. (Joint Exhibit 101, page 1.) However, the accompanying report did not document any change in material facts. In the discussion section for change of material facts, the report notes that the non certification raised concerns about the results of physical therapy and CBT, the lack of occupational therapy and the goals to be obtained with the FRP. Exhibit 101, page 3.) Dr. Lo then discussed the prior results of physical therapy, with the last session reference by Dr. Lo being on June 27, 2024, and compared it to the physical therapy evaluation for the FRP. (*Id.*) Both were reports prior to the original November 27, 2024 RFA. Likewise, his discussion about CBT was based on a comparison from the last session of September 25, 2024 to the FRP

> evaluation on November 12, 2024, again, both of which occurred prior to the first RFA. Id. at page 4.) Finally, Dr. Lo questions whether the original reviewer was in receipt of his initial report, and reiterates findings from that report. (Id.) No where in the report is there any discussion of any change in the applicant's condition since the original November 27, 2024 report, instead, he is disputing the grounds for the original denial.
>
> Defendant did initially refer the February 24, 2025 RFA to UR for review. (Joint Exhibit 102). However, it was cancelled by a "UR Specialist" as there were no documented changes in the facts material to the basis of the prior UR determination. (Id.)
>
> A disagreement with a UR decision is not a documentation of change in circumstances that warrants placing the RFA through UR. (See, *Holguin v. First United Methodist Church & Guideone Mut. Ins. Co*., 2022 Cal. Wrk. Comp. P.D. LEXIS 154). As there was no documented change of material facts, I do not find that defendant was obligated to place the February 24, 2025 RFA through Utilization Review. Accordingly, I do not have jurisdiction to determine the medical necessity of the Functional Restoration Program that was requested in both the November 27, 2024 and February 24, 2025 RFAs.

III.

We highlight several legal principles that may be relevant to our review of this matter. First, as noted by the WCJ, section 4610, subsection (i)(1) governs the timeline for UR of a physician's RFA of current or future treatment. That subsection provides, in relevant part:

> (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. …

(Lab. Code, § 4610(i)(1).)

The WCJ also correctly notes that under subsection (k) of section 4610, a UR decision to modify or deny a treatment recommendation "remains effective for 12 months from the date of the decision without further action by the employer with regard to a further recommendation by the same physician, or another physician within the requesting physician's practice group, for the same

treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision." (Lab. Code, § 4610 (k).)

Also, recognized in the Opinion on Decision is the Appeals Board's en banc decision in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 [2014 Cal. Wrk. Comp. LEXIS 131] (*Dubon II*), which held that:

> 1. A utilization review (UR) decision is invalid and not subject to independent medical review (IMR) only if it is untimely.
>
> 2. Legal issues regarding the timeliness of a UR decision must be resolved by the Workers' Compensation Appeals Board (WCAB), not IMR.
>
> 3. All other disputes regarding a UR decision must be resolved by IMR.
>
> 4. If a UR decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5.

(*Id.* at pp. 1299-1300.)

In so holding, the majority opinion in *Dubon II* noted that "[t]he legislature has made it abundantly clear that medical decisions are to be made by medical professionals." (*Id.* at p. 1309.) In contrast, *Dubon II* recognizes that *legal* disputes are within the WCAB's jurisdiction:

> Sections 4610.5 and 4610.6 limit IMR to disputes over "medical necessity." Legal disputes over UR timeliness must be resolved by the WCAB. (§ 4604 ("[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, … *except as otherwise provided by Section 4610.5*" (italics added)); § 5300 (providing that "except as otherwise provided in Division 4," the WCAB has exclusive initial jurisdiction over claims "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto"); see also Cal. Code Regs., tit. 8, § 10451.2(c)(1)(C).)

(*Ibid.*)

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire

record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 14 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) 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; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer*, supra, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; Kramer, supra, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

V.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the May 5, 2025 Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 4, 2025

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

JULIE GARTZ
WEST COAST WORKERS COMP ATTORNEY
CHAVEZ & BREAULT

CWF/*cs*

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