

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

JOSE YBARGUEN, *Applicant*

vs.

**UNITY COURIER SERVICE, INC.; REDWOOD FIRE AND CASUALTY INSURANCE
COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,
*Defendants***

**Adjudication Number: ADJ11235520
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to allow us time 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 (F&F) issued on November 23, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in relevant part, that defendant timely denied the May 25, 2022 request for authorization (RFA) submitted by Roger Bartholdi, M.D., for an inpatient traumatic brain injury evaluation at Casa Colina Hospital and Centers for Healthcare – Apple Valley, as reflected in the utilization review (UR) modification dated June 10, 2022. (Joint Ex. Z, App. Ex. 3.)

Applicant contends that defendant's UR was untimely because the RFA required expedited review, subject to a 72-hour response pursuant to Labor Code section 4610(i)(3).¹ Applicant further contends that the UR was untimely because its request for additional information dated June 6, 2022 was not timely communicated.²

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

² Applicant also contends that defendant failed to demonstrate a "change in circumstances" pursuant to *Patterson v. The Oaks Farms* (2014) 79 Cal.Comp.Cases 910 (Appeals Board significant panel decision) and *National Cement Company, Inc. v. Workers' Comp. Appeals Board (Rivota)* (2021) 86 Cal.Comp.Cases 595 (writ denied) As we rescind the decision on other grounds, we do not address this contention.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending we deny reconsideration.

We have considered the allegations in the Petition, defendant'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, as our Decision After Reconsideration, we rescind the WCJ's November 23, 2022 F&F and return the matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

BACKGROUND

The parties stipulated to the following facts at the Expedited Hearing on November 16, 2022:

Jose Ybarguen, [] while employed on January 11, 2018 as a delivery courier at Los Angeles, California, by Unity Courier Service, Inc., sustained injury arising out of and in the course of employment to his head, mouth, neck, left wrist and right elbow.

(Minutes of Hearing and Summary of Evidence (MOH/SOE, 11/16/2022, 2:8-11.)

The issues requiring adjudication were as follows:

1. Whether the Utilization Review Decisions of June 6, 2022 (Request for Information) and June 10, 2022 (Denial of requested treatment) was timely with the applicant claiming that the RFA from Dr. Bertoldi dated May 27, 2022 called for an Expedited Review based on the request for inpatient treatment, and with the defendant claiming that the RFA did not call for an Expedited Review consistent with 8 CCR 9792.9.1(c)(4), and that the RFA did not call for inpatient treatment; and therefore, both the UR Request for Information dated June 6, 2022 and the UR Denial dated June 10, 2022 were timely, consistent with Labor Code Section 4610(i) (1) and 8 CCR 9792.9.1(c) (1) and (2).
2. Applicant's entitlement to the treatment outlined in the RFA from Dr. Bertoldi dated May 27, 2022.

(MOH/SOE, 11/16/2022, 2:14-22.)

In his report dated March 31, 2022, Fernando Gonzalez, Ph.D., after his evaluation of applicant, diagnosed him with a Minor Neurocognitive Disorder resulting from the January 11, 2018 industrial motor vehicle accident. (App. Ex. 2, p. 15.) Dr. Gonzalez identified cognitive

weaknesses in several areas, specifically noting “borderline” range performance on tests of mental control and verbal fluency. (*Id.* at p. 13.) Testing revealed a 9th percentile score for learning and a 12th percentile score for delayed recall, suggesting applicant struggles to retain new information over time. (*Id.* at p. 8.) Emotionally, applicant’s profile reflected “Severe” levels of depression and anxiety, which Dr. Gonzalez attributed to the exacerbating effects of chronic physical pain, headaches, and fragmented sleep. (*Id.* at pp. 10, 14.) To address these conditions, Dr. Gonzalez recommended specialized “psychotherapeutic services” and a “psychiatric consultation.” (*Id.* at p. 15.)

Dr. Bertoldi requested in his RFA “Inpatient evaluation Casa Colina Apple Valley” dated May 25, 2022 to address applicant’s traumatic brain injury. (App. Ex. 3, p. 3). In the accompanying primary treating physician’s progress report dated May 25, 2022, Dr. Bertoldi identified several objective clinical markers of impairment, including “abnormal” long and short-term memory, an abnormal Mini-Mental State Examination score of 23/30, and a 3 Tesla MRI showing posttraumatic Unidentified Bright Objects. (*Id.* at p. 2.) He supported the request for evaluation at Casa Colina Apple Valley by citing applicant’s memory and concentration problems. (*Ibid.*) Dr. Bertoldi faxed the RFA on May 27, 2022. (*Id.* at p. 1.)

On June 6, 2022, defendant issued a “Request for Information – NOT AN AUTHORIZATION” (Request for Information). It acknowledged receipt of the RFA on May 27, 2022, and stated that the following information was required by way of clarifying questions:

1. What kind of inpatient program/facility is being requested? ex: skilled, inpatient rehab, long term care, assisted living.
2. What discipline (s) will be doing the evaluation?
3. If this is an inpatient rehab request, please indicate why patient would not be a candidate to try outpatient or home program?

(Joint Ex. Y, p. 1.)

It instructed as follows: “Fax the requested information to 1-415-675-2075. **Please note, this fax number is to be used for this response only.**” It stated that if the requested information was not received by June 10, 2022, the RFA would be denied. Under “Distribution,” it states the following:

Applicant Attorney: Solov Teitell (via mail)

Defense Attorney: HEYWOOD G FRIEDMAN A PROFESSIONAL CORP DBA LAW OFFICES OF HEYWOOD G FRIEDMAN (via mail)

Provider: ROGER BERTOLDI (via fax) (via mail)

Patient: Jose Ybarguen (via mail)

(*Id.* at p. 2.) There is nothing to indicate whether or where the documents were sent. Attached to the exhibit is an envelope addressed to applicant’s attorney, with a date stamp for mailing, that appears to show mailing on June 13, 2022. (*Id.* at p. 3.)

On June 10, 2022, defendant issued a “Notice of Modified Physician Determination,” denying Dr. Bertoldi’s RFA for an inpatient evaluation at Casa Colina Apple Valley. (Joint Ex. Z, p. 1.) The Notice is addressed to Dr. Bertoldi at his mailing address and lists his telephone and fax numbers. There is no indication how it was sent to Dr. Bertoldi. Under “Distribution,” it states: “Applicant Attorney: Solov Teitell (via mail)” and “Employee: Jose Ybarguen (via mail). (*Id.* at pp. 1-2.) The review by Mahdy Flores, D.O., stated that the date of service was June 10, 2022, and that the following medical records were reviewed: “Letter-UR_MD_Request (2 pgs)” and “05/25/22 – RFA- Roger Bertoldi, MD (2 pgs).” It states that the Request for Information letter was reviewed, but it states that “a response was not submitted for this review.” (*Id.* at p. 3.)

On November 23, 2022, the WCJ issued her F&F, finding defendant timely denied Dr. Bertoldi’s RFA for an inpatient evaluation for traumatic brain injury and that the WCAB did not have jurisdiction over the medical treatment dispute.

It is from this F&F that applicant seeks reconsideration.

DISCUSSION

UR governs an employer’s evaluation of an employee’s requests for medical treatment. (Lab. Code, § 4610(g); *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 236 [73 Cal.Comp.Cases 981].) Section 4610 imposes mandatory time limits within which an employer must issue a UR decision. (Lab. Code, § 4610.)

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 Appeals Board may determine medical necessity. If timely, disputes must be resolved through independent medical review. (*Id.* at p. 1299.) Accordingly, the threshold issue is whether defendant’s UR determination was timely.

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/Department of Soc. Servs.* (2014) 79 Cal.Comp.Cases 1519.) 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.) The UR decision was therefore deemed untimely and the Appeals Board had authority to determine the issue of medical necessity for the disputed treatment.

Section 4610 establishes two distinct timing frameworks for prospective or concurrent review: a standard review process and an expedited review process.

Under the standard review framework, “[p]rospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee’s condition,” and in no event later than “five normal business days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination,” with an outside limit of “no event more than 14 days from the date of the medical treatment recommendation by the physician.” (Lab. Code, § 4610(i)(1).)

By contrast, the expedited review framework applies where “the employee faces an imminent and serious threat to the employee’s health,” or where the normal timeframe “would be detrimental to the employee’s life or health or could jeopardize the employee’s ability to regain maximum function.” In such cases, the decision must be made “in a timely fashion that is appropriate for the nature of the employee’s condition, but not to exceed 72 hours after the receipt of the information reasonably necessary to make the determination.” (Lab. Code, § 4610(i)(3).) The Administrative Director (AD) regulations further require that the requesting physician certify the need for expedited review, and that unsupported requests be processed under the standard timelines. (Former Cal. Code Regs., tit. 8, § 9792.9.1(c)(4).)

Under the regulations in effect in 2022, an RFA transmitted by facsimile is deemed received on the date it is electronically date-stamped, or, if no date stamp exists, on the date it was transmitted. (Former Cal. Code Reg., tit. 8, § 9792.9.1(a)(1).)

The statutory and regulatory scheme permits extension of the five-business-day standard review deadline only where the reviewer lacks information reasonably necessary to decide and immediately notifies the physician and the employee in writing, specifying the information required. (Lab. Code, § 4610(j)(2); former Cal. Code Reg., tit. 8, §§ 9792.9.1(f)(1)(A), (f)(2)(A).) Thus, a UR decision issued beyond five business days is timely only if the employer demonstrates compliance with these tolling requirements, including timely and proper communication of the request for additional information.

Here, the record reflects that Dr. Bertoldi transmitted the RFA on May 27, 2022, and defendant acknowledged receipt on that date. The record does not establish that the RFA was designated for expedited review, nor does it contain a certification by the requesting physician that applicant faced an imminent and serious threat to health. On the contrary, the accompanying report reflects routine treatment, and a follow-up appointment scheduled approximately two months later. On this record, the expedited review provisions do not appear to apply, and the standard five-business-day framework governs.

Applying the standard framework, the five-business-day period would have expired on June 6, 2022, absent a valid extension.

Defendant relies on a UR request for additional information dated June 6, 2022, to support application of the extended timeframe under section 4610(j)(2). However, the determinative question is not merely the date appearing on the document, but whether the request was actually and immediately communicated to the treating physician and the employee within the statutory timeframe.

On this record, there is a material evidentiary gap as to that issue. The record does not contain documentation establishing when, or if, defendant transmitted the June 6, 2022 UR request for information. There is no facsimile confirmation, electronic transmission record, or other proof demonstrating timely delivery. At the same time, the record includes an envelope with a barely legible June 13, 2022 postmark, which may suggest that defendant did not mail written notice until after the expiration of the five-business-day period. However, the record does not establish whether defendant utilized other forms of transmission such as facsimile or electronic mail prior to that date.

Because the timeliness of the June 6, 2022 UR determination depends on whether defendant complied with the statutory requirement of immediate written notification, and because the current record does not resolve that factual issue, we are unable to determine whether the June 10, 2022 UR decision was timely under the standard timeframe.

“[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process,” the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117,

1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to “ensure substantial justice in all cases,” and is therefore “clearly permitted” to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264].) “[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers’ compensation claims” and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary. (*Tyler, supra*, 56 Cal.App.4th at p. 394.) An adequately developed record affords all parties due process of law and further provides for meaningful review by the Appeals Board of a WCJ’s decision. (*Evans v. Workers’ Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]; *Hernandez v. Staff Leasing* (2011) [76 Cal.Comp.Cases 343, 346-347] (Appeals Board significant panel decision).)

Pursuant to sections 5701 and 5906, a WCJ or the Appeals Board may not leave undeveloped issues that, through the exercise of their specialized knowledge, recognizes as requiring further evidentiary development. (*Kuykendall, supra*, 79 Cal.App.4th at p. 404.)

Upon remand, the record needs development to address the timeliness of defendant’s UR determination. The parties should provide documentation sufficient to establish the method by which defendant communicated its request for additional information.

Defendant should produce evidence demonstrating whether it was timely and properly communicated its June 6, 2022, UR request for additional information in compliance with section 4610(j)(2). Such evidence may include, but is not limited to, facsimile transmission records, electronic mail confirmations, or other documentation reflecting the date and method of service.

Applicant may submit evidence addressing whether it received timely notice, including testimony, declarations, date-stamped correspondence, or other documentation bearing on when defendant transmitted its June 6, 2022 UR request for information.

This evidentiary augmentation will permit a determination as to whether defendant complied with the requirements necessary to extend the five-business-day review period. If defendant establishes compliance, the extended timeframe may apply. If not, this extension

would render the June 10, 2022 UR denial untimely and grant the Appeals Board jurisdiction to resolve the medical necessity of the inpatient evaluation.

Accordingly, we rescind the WCJ's November 23, 2022 Findings of Fact and return the matter to the trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued November 23, 2022, by the WCJ is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 22, 2026

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

**JOSE YBARGUEN
SOLOV AND TEITELL, A.P.C.
GOLDMAN MAGDALIN STRAATSMA, LLP
LAW FIRM OF FRIEDMAN + BARTOUMIAN**

DLP/md

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