WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TIMOTHY BODAM, ***Applicant,*** **vs.** **SAN BERNARDINO COUNTY/ DEPARTMENT OF SOCIAL SERVICES, legally uninsured,** ***Defendant.***	**Case No. ADJ8120989 (SBR 0041910)** **OPINION AND ORDER DENYING PETITION FOR REMOVAL (Significant Panel Decision)**

Defendant seeks removal of this case to the Appeals Board in order to challenge the December 21, 2013 Expedited Hearing Findings And Order of the workers' compensation administrative law judge (WCJ).[1] The WCJ found in pertinent part that the Workers' Compensation Appeals Board (WCAB) "has jurisdiction to adjudicate treatment when utilization review [UR] is untimely" and that defendant's UR of the Request for Authorization (RFA) to perform spinal surgery submitted by one of applicant's physicians, Wayne Cheng, M.D., was "untimely," and lacked a necessary signature. The WCJ further found that the record did not have substantial evidence to allow proper determination of the treatment request, and for that reason ordered the record "reopened" for development by submission of a supplemental report from Dr. Cheng concerning the proposed surgery.

Defendant contends that the WCAB has no jurisdiction to adjudicate the validity of the UR, that the UR was timely conducted and that the lack of a signature and its transmittal one day after the time

[1] The Appeals Board has designated this as a significant panel decision. Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel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.); 25 Cal. Workers' Comp. Rptr. 197 [News Brief, August 1997].)

allowed by the Rules of the Administrative Director (AD) does not make it "invalid," and that the WCJ issued inconsistent findings that do not support his decision.

A response was received from applicant.[2] The WCJ provided a Report & Recommendation of Judge on Petition for Removal (Report) recommending that removal be denied.

We have considered the provisions of Labor Code section 4610(g)(1) and (g)(3)(A) and AD Rule 9792.9.1(e)(3) and hold:

> (1) A defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision;
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> (2) A UR decision that is timely made but is not timely communicated is untimely;
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> (3) When a UR decision is untimely and, therefore, invalid, the necessity of the medical treatment at issue may be determined by the WCAB based upon substantial evidence.

In this case, the WCJ correctly determined that defendant's UR decision was not timely communicated and therefore invalid. Further, the WCJ properly ordered further development of the record by directing the parties to obtain a supplemental report from Dr. Cheng. Accordingly, we deny removal.

BACKGROUND

It was earlier found on June 15, 2012, that applicant sustained industrial injury to his lower back on March 24, 2011, and that he is in need of further medical treatment. The December 9, 2013 Minutes of Hearing reflect that applicant's primary treating physician, Edward G. Stokes, M.D., referred applicant for a surgical consultation to Dr. Cheng of Loma Linda University Medical Center.

On October 28, 2013, Dr. Cheng faxed an RFA to defendant's adjuster State Compensation Insurance Fund (SCIF), requesting authorization to perform three-level fusion surgery at L3-S1. (Ex. D-1.) SCIF referred the RFA to its UR agent Forté on October 28, 2013.

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[2] Defendant submitted a reply to applicant's response, but it was not requested and its filing is not approved (Cal. Code Regs., tit. 8, § 10848 ["When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board."].)

On October 31, 2013, Forté made its UR decision to deny the treatment request based upon a report prepared by California-licensed and Board certified orthopedic surgeon David C Bachman, M.D., who reviewed the RFA and determined the surgery was not medically supported. (Ex. 10-1.)

On November 5, 2013, defendant mailed written denial letters to applicant (Ex. D-2) and to Dr. Cheng (Ex. D-3), with copies to applicant's attorney.

There is no evidence that the October 31, 2013 UR decision was communicated to Dr. Cheng by fax, phone, or email within 24 hours after the UR decision was made. There is also no evidence that written notice of the October 31, 2013 UR decision was provided to applicant, Dr. Cheng, or applicant's attorney within two business days after the UR decision was made.

DISCUSSION

Section 4610 provides time limits within which a UR decision must be made as well as when it must be communicated and the manner of transmittal. These time limits are mandatory. In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (*Dubon II*), the Appeals Board held that the WCAB has jurisdiction to determine whether a UR decision is timely. If found untimely, the UR decision is invalid. Under those circumstances, the WCAB may decide the issue of the medical necessity of the requested treatment based on substantial medical evidence. The employee bears the burden of proving that the treatment is reasonably required. (Cf. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*).)

When, as in this case, the RFA is for "prospective" treatment, i.e., the treatment has not yet been provided, section 4610(g)(1) provides:

> "Prospective … decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five working days from the receipt of the 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."

In the present case, the RFA was received on October 28, 2013 and the UR decision was timely made three days later on October 31, 2013. However, a UR decision not only must be timely made; it must be timely communicated. A UR decision that is not timely communicated is of no use and defeats the legislative intent of a UR "process that balances the interests of speed and accuracy, emphasizing the

quick resolution of treatment requests …" (*Sandhagen*, *supra*, 44 Cal.4th at p. 241.). Thus, section 4610(g)(3)(A) imposes further mandatory time requirements for communicating a UR decision. These time limits run from the date the UR decision is *made*, even if the UR decision is made in less than the five days allowed under section 4610(g)(1):

> "Decisions to approve, modify, delay, or deny requests by physicians for authorization prior to … the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision. Decisions resulting in modification, delay, or denial of all or part of the requested health care service *shall be communicated to physicians* initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or *within two business days of the decision for prospective review*, as prescribed by the administrative director." (Emphasis added.)

Section 4610(g)(3)(A) was clarified by former AD Rule 9792.9.1(e)(3), which, at the time of defendant's UR determination, provided:

> "[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 telephone shall be followed by written notice* to the requesting physician…*within two (2) business days for prospective review…*" (Former Cal. Code Regs., tit. 8, § 9792.9.1(e)(3), emphasis added.)[3]

There is no evidence that defendant or its UR provider phoned, faxed, or emailed the UR denial to Dr. Cheng within 24 hours after defendant made its UR decision on October 31, 2013. Therefore, defendant's UR decision is untimely and invalid for that reason.

Additionally, defendant's UR decision is untimely because written notice was not sent to Dr. Cheng, applicant, and applicant's attorney within two business days after the UR decision was made. The only evidence of written communication of the UR decision is the two denial letters, which are dated November 5, 2013. This is beyond the statutorily required two business days after the Thursday, October 31, 2013 decision was made. (Civ. Code, §§ 7, 9, 10.)

Thus, there are two reasons why defendant's UR decision is untimely here, and the WCJ correctly found that defendant's UR was untimely and therefore invalid.

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[3] AD Rule 9792.9.1 was subsequently amended, but the applicable timeframes remain the same.

Accordingly, the WCAB has authority to determine the issue of medical necessity. However, a decision regarding the medical necessity of the treatment request must be supported by substantial evidence in light of the entire record. (*Dubon II*, *supra*; *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

The WCJ concluded in this case that neither party presented substantial medical evidence that would allow a properly supported decision concerning the proposed spinal surgery. When neither party has presented substantial evidence, the WCJ may order development of the record. (*San Bernardino Comm. Hospital v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 935 [64 Cal.Comp.Cases 986].) " '[I]t is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence.' " (*Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787], quoting *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (*Zuniga*) (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].) The "principle of allowing 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." (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) The WCJ properly concluded that there is a need to develop the record by obtaining a supplemental report from Dr. Cheng so that a proper determination can be made based upon substantial medical evidence.

Defendant's petition to remove the case to the Appeals Board is denied, and the WCJ's December 21, 2013 decision is affirmed.

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For the foregoing reasons,

IT IS ORDERED that defendant's petition to remove the case to the Appeals Board is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

I CONCUR,

/s/ Neil P. Sullivan
NEIL P. SULLIVAN, Deputy Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

11/20/2014

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

TIMOTHY BODAM
LAW OFFICES OF DENNIS W. RYAN
INGBER & WEINBERG

JFS/abs