

1                                   **WORKERS' COMPENSATION APPEALS BOARD**  
2                                   **STATE OF CALIFORNIA**  
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5 **EMMETT BOONE,**

6                                   *Applicant,*

7                                   **vs.**

8 **DREYER'S GRAND ICE CREAM;**  
9 **FIREMAN'S FUND INSURANCE**  
10 **COMPANY,**

11                                   *Defendants.*

**Case No. ADJ3685938 (WCK 0066506)**  
**(Oakland District Office)**

**OPINION AND DECISION**  
**AFTER**  
**RECONSIDERATION**

12           On November 4, 2014, we granted reconsideration of the August 14, 2014 Findings and Award  
13 wherein the WCJ found that the April 18, 2014 and May 22, 2014 utilization review decisions denying  
14 authorization for refills of certain prescriptions were invalid and awarded ongoing and timely refills of  
15 his prescriptions. This is our Decision after Reconsideration.

16           Defendant contends that the WCJ erred in awarding the medical treatment, arguing that there was  
17 no material defect and the defendant timely notified applicant's treating physician of the utilization  
18 review denial. Defendant also seeks removal and contends that the WCJ's decision is not justified and  
19 "constitutes significant prejudice and irreparable harm." (Petition for Reconsideration and/or Removal,  
20 p. 3.)

21           We have considered the Petition for Reconsideration and/or Removal and we have reviewed the  
22 record in this matter. We have not received an Answer from applicant. The WCJ prepared a Report and  
23 Recommendation on Petition for Reconsideration (Report), explaining that the defendant's April 18,  
24 2014 and May 22, 2014 utilization review determinations were defective both because the UR physicians  
25 were provided with an insufficient medical record, and on the grounds that notifications of the denials  
26 were not provided to applicant's primary treating physician within 24 hours. The WCJ recommended that  
27 we deny reconsideration.

1 As a preliminary matter, Labor Code § 5900(a) allows reconsideration only of a “final order,  
2 decision, or award.” (Emphasis added.) (See also Labor Code §§ 5901-5903) A “final” order has been  
3 defined as one “which determines any substantive right or liability of those involved in the case.”  
4 (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals*  
5 *Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation*  
6 *Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 29, 45 [43 Cal.Comp.Cases  
7 661, 665].) An award of medical treatment is a final order and, accordingly, we granted reconsideration  
8 rather than removal in our November 4, 2014 Order.

9 For the reasons stated below, as our Decision after Reconsideration, we will affirm the August 14,  
10 2014 Findings and Award. In his Report, the WCJ summarized the relevant facts as follows:

11 “It was on April 18, 2014, that defendant issued its first written UR denial  
12 (Defendant’s Exhibit A) for Capsaicin cream, Ketamine cream and  
13 Lidoderm patches. The UR report was addressed to both applicant’s  
14 attorney and Dr. Morley and was initiated in response to Dr. Morley’s  
15 March 20, 2014 report. It was authored by Vinson DiSanto, D.O. The UR  
16 report also indicates that Dr. DiSanto unsuccessfully tried to contact  
17 Dr. Morley’s office by telephone, at 6:05 PM on April 17, 2014 for a peer-  
to-peer contact, leaving a message, and thereafter, unsuccessfully attempted  
to peer-to-peer contact again on April 18, 2014 at 12:2007 [sic] PM, again  
leaving a message.” (Report, p. 4.)

18 When the WCJ issued his decision, the role of the WCAB with regard to the utilization review  
19 and independent medical review processes was governed by *Dubon v. World Restoration, Inc.* (2014) 79  
20 Cal.Comp.Cases 313 (*Dubon I*), wherein the Appeals Board held that a UR decision is invalid if it is  
21 untimely or suffers from material procedural defects that undermine the integrity of the UR decision, and  
22 that if a defendant’s UR is found invalid the issue of medical necessity is to be determined by the WCAB  
23 based upon substantial medical evidence, with the employee having the burden of proving the treatment  
24 is reasonably required. However, the Appeals Board revisited the issues addressed in *Dubon I* following  
25 the defendant’s Petition for Reconsideration in that case. (*Dubon v. World Restoration, Inc. (Dubon II)*  
26 (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*).) In *Dubon II*, the Appeals Board  
27 modified the holding in *Dubon I* by affirming that a UR decision is invalid if it is untimely, but further

1 holding that *all* other disputes concerning a UR must be resolved by IMR.<sup>1</sup>

2 Thus, the threshold question in this case is whether defendant's UR was untimely and invalid as  
3 described in *Dubon II* and as found by the WCJ. We agree with the WCJ that the UR was untimely and  
4 is invalid.

5 A defendant must comply with *all* of the timeliness requirements of Labor Code section 4610.<sup>2</sup>  
6 (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th  
7 230 [73 Cal.Comp.Cases 981]; *Dubon II, supra.*) That is, the defendant must comply not only with the  
8 requirement to *make* a UR decision within the time frames specified in section 4610 but also must also  
9 comply with the requirement to *communicate* that decision within the specified time frames.

10 Section 4610(g)(3)(A) provides as follows:

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

16 In this case, as discussed by the WCJ in his Report, it is apparent from defendant's Exhibit A,  
17 that the April 18 utilization review decision was not communicated to Dr. Morley within 24 hours.  
18 Accordingly, it was not a timely utilization review denial, and the WCJ appropriately determined the  
19 issue of medical necessity based on substantial medical evidence. Therefore, we will affirm the WCJ's  
20 decision.

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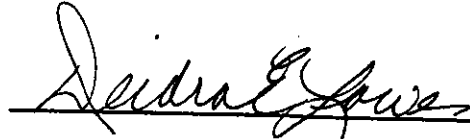
24  
25 <sup>1</sup> En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs.,  
26 tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70  
27 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].

<sup>2</sup> Further statutory references are to the Labor Code.


1 For the foregoing reasons,


2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation  
3 Appeals Board, that the August 14, 2014 Findings and Award is **AFFIRMED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **DEIDRA E. LOWE**

9 **I CONCUR,**

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13 **MARGUERITE SWEENEY**

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16 **FRANK M. BRASS**



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19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20  
21 **DEC 02 2014**

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

24 **EMMETT BOONE**  
25 **BOXER & GERSON**  
26 **LEWIS, BRISBOIS, BISGAARD & SMITH**

27 **MWH/bgr**

**BOONE, Emmett**